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Supreme Court, U.S.
FILED

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No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

CHI-MING CHOW,
Petitioner,

v.

STATE OF MICHIGAN, ATTORNEY
GENERAL'S OFFICE, et al.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE FEDERAL COURTS HAVE JURISDICTION TO HEAR A PLAINTIFF'S CLAIM AGAINST STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITY IF THE PLAINTIFF HAS NOT EXPLICITLY STATED IN HIS COMPLAINT THE CAPACITY IN WHICH HE IS SUING THEM?

2. WHETHER THE COURT BELOW ERRED IN HOLDING, CONTRARY TO DECISIONS OF THIS COURT, THAT A PROSECUTOR'S CONDUCT IN INVESTIGATING A COMPLAINT IS PROTECTED BY ABSOLUTE IMMUNITY?

LIST OF PARTIES

PETITIONER:	Chi-Ming Chow
RESPONDENTS:	State of Michigan, Attorney General's Office, Frank J. Kelley, Robert Ianni, George E. Ward, jointly and severally

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PETITION FOR WRIT OF CERTIORARI

Petitioner requests that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on August 26, 1998, which affirmed a ruling by the United States District Court for the Eastern District of Michigan, Southern Division, on April 30, 1997 granting Respondent's Motions for Summary Judgment and Stay of Discovery.

OPINIONS BELOW

The Opinion of the United States Court of Appeals is contained in the Appendix at 29a. It has not been recommended for publication. The Opinion of the Judge of the United States District Court for the Eastern District of Michigan, Southern Division, is contained in the Appendix at 34a and is not reported.

JURISDICTION

The Opinion of the Court of Appeals to be reviewed was entered on August 26, 1998. A timely Petition for Rehearing was filed and was denied on September 24, 1998. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by Writ of Certiorari, is conferred on this Court by 18 U.S.C. 1254(1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.
Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Chi-Ming Chow is a naturalized citizen of the United States and is a resident of Washtenaw County, Michigan. Prior to his retirement in 1992, he taught mathematics at Oakland County Community College for 26 years.

In August 1989, Petitioner planned to take a trip to Europe. He intended to take with him one of several identical new pairs of shoes that he had purchased from K-Mart.[1] In order to ensure that the new shoes he intended to bring were comfortable, he began wearing them several weeks before his scheduled departure date of August 23, 1989. On August 12, 1989, Petitioner went shopping at the K-Mart in Van Buren Township. While he was browsing in the shoe department, he overheard a saleswoman say the word "teacher" in a disrespectful manner. He ignored her and continued trying on shoes. He eventually decided to buy two pairs of shoes that fit him better than the pair he was wearing. He took the shoes to the check-out counter to pay for them along with other items he had picked up before the shoes. On his way out of the store, however, he was stopped by a K-Mart security guard, Fred Sweet. Apparently, a saleswoman in the footwear department, Jill Fehrenbach, had called the security guard, stating that Petitioner had taken an old pair of shoes that he had worn into the store, put on a new pair from the shelf, and placed the old pair back on the shelf, with the intention of leaving without paying for the new shoes.

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[1] See Appendix at 104a, letter from Chow, which, with its attached exhibits -- all in the record below -- sets forth in greater detail the events of the unjust criminal action against him.

Petitioner recognized the saleswoman who accused him as the same person he heard say "teacher" earlier and he later discovered that she had been a student in 1986 and 1987 at the same college where he taught. (See Appendix at 106a). Petitioner attempted to show the guard that the shoes he was wearing could not be mistaken for new shoes because of the clear indications of deep wear and usage, including splashes of mud, but the guard refused to listen. Petitioner was arrested, handcuffed and taken by police cruiser to the police station. He was eventually released on bond.

The security guard and saleswoman prepared incident reports, which were submitted to the police. (See Appendix at 128a-130a). The reports state that Chow tried on a pair of shoes in the shoe department and then walked to the check-out counter and did not pay for the shoes he was wearing. The police prepared a report also saying the same thing.

At the pretrial conference, the Prosecutor for Van Buren Township, seeing the worn condition of the allegedly stolen shoes, admitted the shoes looked bad and offered to drop the charges if Petitioner would agree to sign a waiver of any claims he might have against K-Mart or Van Buren Township. Petitioner refused to waive any claims and the case went to trial.

Petitioner was tried and wrongfully convicted of larceny under $100 for the alleged theft of the "new" shoes from K-Mart on the basis of perjured testimony and manufactured evidence. His conviction was overturned on appeal. The evidence on which Petitioner was convicted included the testimony of the saleswoman and the guard which differed significantly from their earlier written reports. Their testimony (and the opening and closing arguments of the Prosecutor) centered on, and dwelled at length on, allegations that Chow had after leaving the shoe department, walked around the store for 15 minutes with the new shoes on, all the while scuffing the heels. None of this was in the original reports. Petitioner's trial attorney inexplicably failed to cross-examine the witnesses or impeach them with the incident reports. The Prosecutor also introduced "test" evidence which was manufactured with the help of the guard, and which was clearly inadmissible without a greater foundation. The guard produced shoes that he said he had worn and attempted to scuff for fifteen minutes to compare with the allegedly stolen shoes. Petitioner's attorney, however, did not object to the evidence. Also, the shoes allegedly left on the shelf were not shown to the jury. Those shoes were several sizes larger than Petitioner's shoe size, a fact noted by the court overturning the conviction. See Transcript of Hearing before Judge Battani on February 1, 1991 at Wayne County Circuit Court.

Petitioner appealed to the Wayne County Circuit Court. Judge Marianne Battani reversed Petitioner's conviction on the ground that his trial counsel was ineffective. After the hearing, all the evidence was placed in a large box, sealed and signed by the attorneys and delivered to the Prosecutor for safekeeping. This process was videotaped by the Petitioner. The Prosecutor then appealed to the Michigan Court of Appeals, which affirmed the decision of the Circuit Court and remanded the case for a new trial. During the appellate process, the Court of Appeals granted Petitioner's Motion to Compel the Prosecutor to produce the shoes he was accused of stealing, and also agreed to review the videotape. Petitioner had made the videotape of the evidence all along, because he was suspicious of the conduct of the police and Prosecutors and how they were handling his case. He was afraid that his best evidence -- the shoes he was wearing with their wear marks -- would disappear. He also took some photographs of the shoes. (Appendix at 28a)

On May 1, 1992, Petitioner, through his attorney, filed a complaint with the Wayne County Prosecutor's Office, charging that K-Mart and the Van Buren Prosecutor's Office had made false accusations and that perjury had occurred at trial. The Wayne County Deputy Chief Prosecutor made an appointment to go to view the physical evidence at Van Buren Police Department. However, before that appointment could be kept, and before the Court of Appeals Order could be complied with, the shoes disappeared! The evidence box containing all the physical evidence had been "lost". The Van Buren Police Department investigated the loss and, in a letter, said that a "civilian clerk" in charge of the property room had disposed of the shoes after receiving a call from an anonymous male who told her they were no longer needed in court.[2] This was exactly what Petitioner had feared when he decided to make his own record of the physical evidence. That videotape of the shoes still exists, as do the photographs showing the condition of the various pairs of shoes held by the police as evidence in the Petitioner's case. (See Appendix at 28a and 97a)

At the District Court, where the case had been remanded for trial, the Prosecutor moved to dismiss the case against Petitioner, given that the physical evidence was gone. Petitioner's counsel agreed. Petitioner's concerns that this might prevent him from obtaining civil and criminal relief were overcome by statements made on the record by the judge and counsel. The district court granted the motion on July

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[2] The civilian clerk was later discovered to be a police officer

29, 1993. (See Appendix at 92a)

The criminal proceedings were finally over, but the Petitioner did not feel that he had been vindicated. He had spent four years and more than $60,000 to clear his name and he felt that he was the victim of a great injustice. What is more, it appears that the injustice was as a result of criminal actions. Petitioner believes that there was perjury by the witnesses at the trial and that this was suborned by K-Mart, the Prosecutor and the Van Buren Township Police. He also believes that his own original trial counsel may have been involved in this conspiracy. The purpose of the conspiracy was to conceal the incompetence of the Prosecutor and police, their reliance on obviously perjured testimony and the saleswoman's malicious accusations against Petitioner, and, ultimately, to prevent him from having any success in bringing false arrest and malicious prosecution claims.[3]

Petitioner attempted to have his complaints investigated by the Wayne County Prosecutor's Office. In addition to his May 1, 1992 complaint, on September 3, 1993, Petitioner's attorney, Joseph Wagner, wrote on Petitioner's behalf to Defendant George Ward, then Chief Assistant Prosecutor for Wayne County, about filing a criminal complaint against the individuals who perjured themselves. That was the beginning of a three-year quest to have Prosecutors investigate criminal activity by Petitioner's accusers and Prosecutors. After exchanging letters and phone calls, Ward informed Petitioner, essentially, that he should seek civil remedies rather than criminal. (See Appendix at 204a)

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[3] It should be noted that the Prosecutor acting for Van Buren Township was an attorney from a private law firm contracted to the Township and that K-Mart's security guard, Fred Sweet, was also in the employ of the Van Buren Township Police.

Petitioner's request to the Wayne County Prosecutor's Office having been rejected, Petitioner proceeded to file a complaint with the Attorney General's Office in September 1994. Although that Office initially rejected his request, Petitioner and his counsel eventually met with Defendant Robert Ianni, Assistant in Charge, Criminal Division, Michigan Attorney General's Office in June 1995. Defendant Ianni again refused to initiate a criminal investigation because, he claimed, there was insufficient evidence. (See Appendix at 202a)

Petitioner continued to request that the Attorney General's Office investigate his case, enlisting the support of numerous legislators who also petitioned the Attorney General's Office to conduct an investigation, but without success. (See Appendix at 181-193a)

PROCEEDINGS BELOW

In September 1996, Petitioner filed a Complaint in the United States District Court, Eastern District of Michigan, Southern Division, alleging that the State of Michigan and the Michigan Attorney General's Office violated his rights under the Fourteenth Amendment to due process and equal protection by failing to investigate his complaint of criminal activity adequately and thoroughly, and by acting arbitrarily and capriciously in that only a "vague superfluous investigation was conducted". Petitioner also claimed that Michigan Compiled Laws 14.28 and 767.3 are unconstitutional and unreasonable in that they give too broad a discretionary power to investigate criminal complaints. Petitioner filed an Amended Complaint on October 25, 1996 naming Defendants Frank Kelley, Robert Ianni and George

Ward individually. Although the Amended Complaint does not state specifically whether he is suing Defendants Kelley, Ianni and Ward in their personal or official capacities, the original Complaint refers to Ianni as acting on behalf of his employer "by and through his official capacity with the Michigan Attorney General's Office". The Amended Complaint does not refer to the individual Defendants as acting in their official capacity. (See Appendix at 207a and 216a)

Before any discovery could take place, Respondents State of Michigan Attorney General's Office, Frank Kelley and Robert Ianni moved to have Petitioner's Complaint dismissed pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(4) and 12(b)(6), claiming the court had no jurisdiction to hear the Complaint because they have Eleventh Amendment and absolute prosecutorial immunity. Respondent Ward moved to stay discovery and to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), claiming prosecutorial immunity and qualified immunity. Federal Magistrate Steven D. Pepe wrote a report and recommendation, on April 9, 1997, finding that the Defendants were protected by Eleventh Amendment Immunity and qualified immunity. Judge Pepe looked at absolute immunity but said it was not necessary to address the issue as the Respondents were entitled to the other immunities. Judge Julian Abele Cook, for the U.S. District Court, adopted the analysis of Judge Pepe and granted the Respondent's motions and entered Judgment for the Respondents on April 30, 1997. In its Order, the court held that because Petitioner had not set forth clearly in his pleadings that the Respondents were being sued in their individual capacity, the court must assume he is suing them in their official capacity, and therefore they are entitled to Eleventh Amendment immunity. The court also held that the Respondents were entitled to qualified immunity as governmental officials performing discretionary functions.

The Order did not address the issue of absolute immunity. Petitioner's prayer that the court declare the statutory provisions MCL 14.28 and MCL 767.3, unconstitutional, was also rejected on the grounds that Petitioner lacked standing to challenge their constitutionality.

Petitioner filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. On August 26, 1998 the Sixth Circuit panel hearing the case affirmed the District Court's granting of Summary Judgment. In a brief, unpublished Opinion, the Sixth Circuit held that they had no jurisdiction to hear Petitioners claims for damages because the claims against all appellees except Ward were barred by the Eleventh Amendment. The Sixth Circuit found that Ward did not have Eleventh Amendment immunity, but, citing Imbler v Pachtman, 424 U.S. 409 (1976), said Ward was protected by the doctrine of absolute prosecutorial immunity. The Court of Appeals did not address the issue of qualified immunity except to decline to adopt the district court's reasoning on Eleventh Amendment immunity and qualified immunity with regard to Ward. The Court of Appeals also upheld the lower court's ruling with regard to Petitioner's standing to challenge the constitutionality of the statutory provisions.

This Petition is being filed simultaneously with a petition from a civil action in the state courts for malicious prosecution, arising out of the same underlying criminal action from which this case arose, Chi-Ming Chow v Van Buren Township and K-Mart Corporation and Jill Fehrenbach.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE FEDERAL COURTS HAVE JURISDICTION TO HEAR A PLAINTIFF'S CLAIM AGAINST STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITIES IF THE PLAINTIFF HAS NOT EXPLICITLY STATED IN HIS COMPLAINT THE CAPACITY IN WHICH HE IS SUING THEM?

2. WHETHER THE COURT BELOW ERRED IN HOLDING, CONTRARY TO DECISIONS OF THIS COURT, THAT A PROSECUTOR'S CONDUCT IN INVESTIGATING A COMPLAINT IS PROTECTED BY ABSOLUTE IMMUNITY?

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve a difference among the Circuits as to whether the courts have jurisdiction to hear a plaintiff's claim against state officials if the capacity of the defendants has not been explicitly stated and striking down a decision not in conformity with this Court's prior rulings regarding the scope of absolute immunity.

ARGUMENT

1. ELEVENTH AMENDMENT IMMUNITY

The Court of Appeals for the Sixth Circuit said it has no jurisdiction to hear the Petitioner's claims for damages against all the Respondents except Ward because they were barred by the Eleventh Amendment of the United States Constitution. In reaching this conclusion, the Court of Appeals relied on the reasoning set forth in the U.S. District Court's April 30, 1997 Order, and assumed that the Petitioner was suing the Respondents in their official capacities.

It is well established that state officials sued in their official capacity, under 42 U.S.C. § 1983, are protected by the Eleventh Amendment. Will v Department of State Police, 491 U.S. 58, (1989). However, they enjoy no such protection when sued in their personal capacity: "state officials sued in their individual capacities are 'persons' for purposes of 1983". Hafer v Melo, 502 U.S. 21, 23 (1991).

The Petitioner in this case asserts that he is suing the Respondents in their individual capacities and the Sixth Circuit Court of Appeals and the court below were wrong to *assume* that the suit was brought against the Respondents in their official capacities because he did not explicitly state otherwise in the pleadings. The question of the appropriate way to treat a Complaint that fails to state explicitly the capacity in which a defendant is sued under §1983 has been well developed in the federal circuit courts and two distinct approaches have emerged. Only Sixth and Eighth Circuits require a clear statement of capacity. Wells v Brown, 891 F.2d 591 (6th Cir. 1989), and Nix v Norman, 879 F.2d 429 (8th Cir. 1989) respectively.

The District Court's Order, in this case, following the Sixth Circuit's development of this issue, relied on Wells v Brown, supra, to find that a plaintiff must set forth clearly in their pleadings that they are suing the state defendants in their individual capacity. If it is not stated otherwise in the pleadings, then, the court said, it *must assume* that the plaintiff is suing the defendant in the defendant's official capacity and the damages claim must be dismissed.

The Sixth Circuit's approach would appear to be contrary to F. R. Civ. P. 9(a) that states in relevant part:

> It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court.

However, the Sixth and Eighth Circuit Courts of Appeals, in Nix v Norman, *supra*, and Wells v Brown, *supra*, approach capacity in §1983 suits as a jurisdictional issue. They reason that because the Eleventh Amendment presents a limitation on the subject matter jurisdiction of federal courts in civil rights cases against states and their employees, Fed. R. Civ. P. 9(a) requires a clear statement of capacity in the complaint to demonstrate that Eleventh Amendment immunity is not implicated and that jurisdiction is proper.

On the other hand, the Fourth Circuit Court of Appeals analyzed the difference between jurisdictional issues and immunity issues with regard to the Eleventh Amendment in a 1995 case, Biggs v Meadows, 66 F.3rd 56 (4th Cir. 1995). In that case, the Fourth Circuit looked at the question of whether a plaintiff needed to expressly state capacity in a § 1983 suit for the first time. In rejecting the approach of Nix and Wells, *supra*, the Fourth Circuit concluded that immunity issues are not the same as jurisdictional issues, they are distinct from jurisdictional issues in a number of ways. For example, federal courts must evaluate subject matter jurisdiction independently of the parties' contentions, whereas courts have discretion to raise Eleventh Amendment immunity. Commenting on the Eleventh Amendment in Patsy v Bd. of Regents, 457 U.S. 496, this Court noted that "we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion". 475 U.S. at 516, note 19. Furthermore, a state may under certain circumstances waive its Eleventh Amendment immunity, but a party cannot take any action which confers subject-matter jurisdiction upon a federal court. Looking at the effect of a grant of federal-question jurisdiction to district courts on Eleventh Amendment immunity, this Court in Blatchford v Native Village of Noatak, 501 U.S. 775 (1991), noted that "[t]he issues are wholly distinct". 501 U.S. at 786 n.4. The Fourth Circuit concludes that Eleventh Amendment Immunity is not truly a limit on the subject matter jurisdiction of courts.

Once the distinction between immunity issues and jurisdiction is recognized, it is clear that the pleading standards that the Sixth Circuit Court of Appeals currently requires to show jurisdiction in §1983 cases are prohibited by the Federal Rules of Civil Procedure. This Court has already rejected the idea of a "heightened pleading standard" inconsistent with the liberal system of "notice pleading" set up by the Federal Rules of Civil Procedure. Leatherman v Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993). In Leatherman, the Court rejected a "heightened pleading standard" in civil rights cases alleging municipal liability under 42 U.S.C. § 1983, noting that all the rules require is a "short and plain statement of the claim" that will give the defendants notice of what the plaintiff's claim is and the grounds on which it rests. 507 U.S. 163, 168.

The majority of Circuits that have looked at this issue (Second, Third, Fourth, Fifth, Ninth, Tenth and Eleventh) have adopted a more liberal approach, looking at the substance of a plaintiff's claim, the relief sought, and the course of proceedings to determine capacity. See Frank v Relin, F.3d 1317, 1326 (2d Cir.), *cert. denied*, 114 S. Ct. 604 (1993); Gregory v Chehi, 843 F.2d 111, 119-120 (3rd Cir.1988); Biggs v Meadows, 66 F.3rd 56, (4th Cir. 1995); Parker v Graves, 479 F.2d 335,336 (5th Cir.1973); Conner v Reinhard, 847 F.2d 384, 394 (7th Cir. 1988), *cert denied*, 488 U.S. 856 (1988); Price v Akaka, 928 F.2d 824, 828 (9th Cir. 1990), *cert. denied*, 502 U.S. 967 (1991); Houston v Reich, 932 F.2d 883,885 (10th Cir. 1991); Lungdren v McDaniel, 814 F.2d 600,604 (11th Cir.1987).

In Biggs v Meadows, the Fourth Circuit adopted the majority view that it found to be more persuasive and held that a plaintiff is not required to expressly plead the capacity in which he is suing a defendant in order to state a cause of action under § 1983.

If the Petitioner's case had been brought in any one of the majority of Circuits, he would have been able to show that he was bringing his suit against Respondents Kelley, Ianni and Ward in their individual capacities. Looking at the substance of the Petitioner's claim, the relief sought and the course of proceedings, it is clear that the Petitioner sought relief from the individual Respondents personally.

Petitioner's intent is most clearly illustrated by his filing of an Amended Complaint. The original Complaint named only the State of Michigan and the Attorney General's Office as Defendants, but mentioning the Respondents Kelley, Ianni and Ward in the body of the Complaint. In particular, he refers to Robert Ianni as acting for the Defendants in his "official capacity". When Petitioner filed an Amended Complaint, six weeks later, he added Respondents Ianni, Ward and Kelley as parties *individually* and in his description of the Defendants in his general allegations he deletes the mention of Ianni acting in an official capacity. The action of amending the Complaint to name specific individuals and to change the way that they are described is enough to give them notice that they are being sued in their personal capacity. However, going further and reading the allegations against the individual Defendants, it is clear that the allegations are of individual actions and not official policy or custom which might shield Defendants from individual liability. Ianni, Ward and Kelley are all accused of failing to carry out their duties.

It is also clear that the individual Respondents recognized their personal exposure because they raised a defense of qualified immunity, a defense which is only available in personal capacity suits. The Respondents' assertion of that defense shows that they had notice that they were being sued personally.

Furthermore, the relief requested by Petitioner from the Respondents in his Amended Complaint is compensatory damages, a form of relief unavailable if he was suing them in their official capacities. It simply would not make sense for the Petitioner to sue the Respondents in their official capacity and request a form of relief that is unavailable to him in such a suit.

The Court in Hafer v Melo, *supra*, noted that some of the plaintiffs had not specifically stated the capacity in which they were suing the defendant, a state official. The Court also noted that the Third Circuit's approach was to look to the proceedings below to determine defendant's capacity, and that other circuits adhere to that practice, but "others impose a more rigid pleading requirement." 502 U.S. 21, 32. Although the Court noted the split among the Circuits it declined to resolve it because the issue was not properly before the Court. Petitioner's case provides the court with an opportunity to resolve the difference between the Circuits.

2. ABSOLUTE IMMUNITY

The Sixth Circuit Court of Appeals held that Petitioner's claims against Defendant Ward were barred by the doctrine of absolute prosecutorial immunity, citing Imbler v Pachtman, 424 U.S. 409 (1976). The Court rejected the District Court's holding that Ward was protected by Eleventh Amendment immunity and qualified immunity.

Imbler v Pachtman, 424 U.S. 409 (1976) establishes that absolute immunity is available for much of a prosecutor's role. However the Court specifically left open "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." Id., at 430-431. The Court of Appeals below, erred in finding that Respondent Ward was immune from suit under Imbler. The issue in Petitioner's case was not decided by Imbler. It is clear from the Complaint that Ward was acting in his investigative role rather than an advocacy role at all times relevant to the suit.

Cases decided after Imbler have confirmed the importance of protecting the prosecutor when serving as an advocate in judicial proceedings, but have not specifically extended that immunity to other aspects of the prosecutor's responsibilities. The court will look at the nature of the function performed rather than the identity of the person who performed it in determining whether absolute immunity is applicable. Buckley v Fitzsimmons, 509 U.S. 259 (1993). So, for example in Burns v Reed, 500 U.S. 478 (1991), this Court held that a state prosecuting attorney is not absolutely immune from liability for damages for giving legal advice to the police. In Burns, this Court rejected the argument that absolute immunity for legal advice should be allowed on the basis that there are several checks, other than civil litigation to prevent abuses of authority by prosecutors. This Court noted that one of the most important checks, the judicial process, is not always available for out-of-court activities by prosecutors, particularly, as in the Petitioner's case, if there is no prosecution. 500 U.S. 478 at 496.

The Court in Buckley v Fitzsimmons, 509 U.S. 259 (1993), held that prosecutors were *not* entitled to absolute immunity when they are acting not as advocates but as investigators. The Court held that there is "a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested on the other hand." 509 U.S. 259, 273; cited with approval by this Court in Kalina v Fletcher, No. 96-792 (1997). In Buckley, *supra* the Court pointed out that police officers are not entitled to absolute immunity when carrying out their duties, and so it would be inappropriate for prosecutors to have that immunity when carrying out essentially the same functions.

Petitioner's claims against Respondent Ward are based on Ward's actions in conducting an investigation into Petitioner's complaints. Petitioner, his attorneys and numerous elected officials, including the Governor of Michigan, John Engler, all implored the Respondents to investigate or investigate more thoroughly the Petitioner's allegations. Ward's actions were clearly as an investigator and this function is clearly outside of that part of a prosecutor's role which is protected by absolute immunity. In Buckley, the Court said that it would be an anomaly to deny absolute immunity to a prosecutor in offering legal advice to the police, as seen in Burns, Id., but then "to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested." 509 U.S. 259, 275.

The official seeking absolute immunity has the burden of showing that such immunity is justified for the function in question. Burns v Reed, 500 U.S. 478, 486, citing with approval Forester v White, 484 US 219, 224 (1988), Malley v Briggs, 475 U.S. 335, 340 (1986) and Harlow v Fitzgerald, 457 US 800, 812 (1982). The presumption is that qualified rather than absolute immunity is sufficient to protect government officials. Respondent Ward has not met his burden. He has not shown that his role in investigating the Petitioner's allegations was "intimately associated with the judicial phase of the criminal process," Imbler v Pachtman, 424 US 409, 430 (1976).

In dismissing Petitioner's claim against Respondent Ward, the Sixth Circuit ignored the cases which define and restrict the scope of absolute immunity available to prosecutors. This case presents the Court with an opportunity to clarify the issue of absolute immunity as it pertains to prosecutor's investigative role.

CONCLUSION

For the reasons set forth above, this Court should grant a Writ of Certiorari to the Sixth Circuit.

Respectfully submitted,

/s/______________________
Robert F. Magill, Jr. (P16970)
Counsel of Record
Attorney for the Plaintiff
Chi-Ming Chow
Fionnuala Holowicki (P53904)
Co-Counsel
201 S. Main Street, Suite 700
Ann Arbor, MI 48104
(734) 995-2500

Dated: December 22, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 97-1612

CHI-MING CHOW,)
Plaintiff-Appellant,)
) [FILED OCT 2, 98]
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
/

MANDATE

Pursuant to the court's disposition that was filed 8/26/98 the mandate for this case hereby issues today.

Filing Fee $ A True Copy.
Printing $ Attest:
/s/____________________
Total $ Beth Manning

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET. ROOM 352
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Filed: October 2, 1998

John P. Mayer
Eastern District of Michigan at Detroit
231 W. Lafayette Boulevard
Theodore Levin U.S. Courthouse 5th Floor
Detroit, MI 48226

RE: 97-1612
Chow vs. MI
District Court No. 96-74187/Judge Cook

The mandate issued in the above-styled case.

Please be advised that the certified record will be sent under separate cover.

Very truly yours,
Leonard Green, Clerk

/s/____________________
(Ms.) Beth Manning
Briefs Deputy

cc: Honorable Julian A. Cook Jr.
Mr. Gregory L. Gliha
Ms. Margaret A. Nelson
Mr. William S. Pearson

APPENDIX B

UNITED STATE COURT APPEALS
THE SIXTH CIRCUIT

CHI-MING CHOW,)
Plaintiff-Appellant,)
) [FILED SEP 24, 98]
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
/

ORDER

BEFORE: NELSON, BOGGS, and CLAY; Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/______________________
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET ROOM 352
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Filed: September 24, 1998

Gregory L. Gliha
P.O. Box 5388
Plymouth, MI 48170

Margaret A. Nelson
Office of the Attorney General
Tort Defense Division
120 N. Washington Square
Lansing, MI 48909

William S. Pearson
Wayne County Corporation Counsel
600 Randolph, Second Floor
Detroit, MI 48226-2831

RE: 97-1612
Chow vs. MI
District Court No. 96-74187

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk

(Ms.) Ernestine R. Tennyson
Operations Supervisor

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 97-1612

On Appeal from the United States District Court for the
Eastern District of Michigan at Detroit

CHI-MING CHOW,)
Plaintiff-Appellant,)
) [FILED SEP 4, 98]
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
/

PETITION FOR REHEARING

Gregory L. Gliha
P.O. Box 5388
Plymouth, MI 48170
(734) 451-772
Counsel for Plaintiff- Appellant
Chi-Ming Chow

Margaret A. Nelson
Office of the Attorney General
Tort Defense Division
120 N. Washington Square Suite 300 B
One Michigan Avenue Bldg. Lansing. MI 48913
(517) 373-6096
Counsel for Plaintiff-Appellee
State of Michigan

William S. Pearson
Wayne County Corporation Counsel
600 Randolph, Second Floor
Detroit, MI 48226-2831
(313) 224-5030
Counsel for Defendants-Appellees
Frank J. Kelley; Robert Ianni;
George E. Ward

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 97-1612

CHI-MING CHOW,)
Plaintiff-Appellant,)
)
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
_______________________________/

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

Now comes, Plaintiff-Appellant. Chi-Ming Chow, by and through his attorney, Gregory, L. Gliha, and states onto this Honorable Court the following in support of his Petition for Rehearing pursuant to Federal Rules of Appellate Procedure (FRAP) 40:

1) That this Honorable Court erred in finding Eleventh Amendment Immunity applicable to all defendants except George E. Ward.

2) That this Honorable Court erred in finding defendant George E. Ward immune under the doctrine of absolute prosecutorial immunity.

3) That this Honorable Court erred in finding MCL § 14.28 and 767.3 not applicable to the facts of this case.

4) That this Honorable Court erred in finding that the stay of discovery granted was proper until immunity issues were resolved.

WHEREFORE. Plaintiff-Appellant, CHI-MING CHOW. pray this Honorable Court. pursuant to FRAP 40, allow a rehearing based in the argument set-forth in the following Brief in Support for Rehearing.

Dated: September 4, 1998 Respectfully submitted,

/s/______________________
Gregory L. Gliha (P-42919)
Attorney for Plaintiff-Appellant
P.O. Box 5388
Plymouth, MI 48170
(734) 451-7772

Petition for Rehearing - 9/4/98

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 97-1612

CHI-MING CHOW,)
Plaintiff-Appellant,)
)
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
______________________________/

BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the opinion of Plaintiff-Appellant, CHI-MING CHOW, this Honorable Court has overlooked or misapprehended the application of the facts to the laws governing governmental immunity in the case at bar.

As to defendant's Frank J. Kelley and Robert Ianni, the facts as plead in the original proceeding should be viewed as a cause of action against them in their individual capacity in that there is no immunity for criminal conspiracy as this case so plainly demonstrates. The actions of these two defendant's to cover up Mr, Chow's complaint are criminal actions.

As to defendant George Ward's absolute immunity, we pray this Honorable Court reconsider it's position. The discretion granted this defendant to decide which cases to prosecute and which to abandon will set a dangerous precedent. Absolute immunity granted to Defendant Ward would grant him "Carte Blanche" authority which was never intended to be granted to such an individual by the people of the State of Michigan..Any private citizen whom, like Mr. Chow is a victim of criminal activity, will never have justice served, especially if the criminal conduct involves individuals who are under the authority of this county prosecutor.

As to MCL § 14.28 and 767.3. the application of these statutes which give the prosecutor "Carte Blanche" authority are extremely applicable to the case at bar. Mr. Chow has standing as a Michigan citizen to have his criminal complaint thoroughly investigated by the Michigan Attorney General just as every other Michigan citizen has. The very wording and purpose of these statutes is to protect the citizens of the State of Michigan from criminal conduct.

As to the discovery stay, Plaintiff-Appellant contends that without having access to facts entirely known to these defendants, it would be nearly impossible for any individual to bring a cause of action against a defendant who pleads immunity; especially if the defendant's actions are criminal in nature.

In summary, Plaintiff-Appellant. CHI-MING CHOW, pray this Honorable Court reconsider all the evidence presented to it along with the attached exhibit prepared by Mr Chow in deciding this case.

Dated: September 4, 1998 Respectfully submitted,

/s/______________________
Gregory L. Gliha (P-42919)
Attorney for Plaintiff-Appellant
P.O. Box 5388
Plymouth, MI 48170
(734) 451-7772

Petition for Rehearing - 9/4/98

Hon. Judges Nelson, Boggs and Clay
U.S. Court of Appeals, 6th Circuit
100 East fifth St. Room 532
532 Potter-Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

Chi-Ming Chow (Mr.)
2580 Holmes Road, No. 16
Ypsilanti, Michigan 48198-4217
(734-484-0294. FAX 734-484-0294)

Re: Chow v State of Michigan, et. al Case No. 97-1612
September 1, 1998

Dear Honorable Judges Nelson, Boggs and Clay:

My name is Chi-Ming Chow. I am the Plaintiff/ Appellate of this case. With my attorney's permission, I am writing this letter in support of my Motion for Rehearing for the Court order of August 26, 1998. All the statements in this letter are backed up by evidence and fact already filed in this Court. I shall write my statement into the following two parts:

1. My response to the Court order which denied my appeal.

2. The truth and fact of my appeal which has been overlooked and neglected by the Court.

Part 1. My response to the Court order:

1. Your Honors state that upon review of the record and briefs of the parties, we find that Chow's claims for damages against all Appellees except Ward are barred by

the Eleventh Amendment and thus this Court has no jurisdiction to hear these claims.

My response: In the first place, this Court has overlooked the difference between intentional criminal act and unintentional wrongful act. It is a common sense that immunity applies to an official's liability for the performance of his duty. Discretion is an official's freedom of choice based on honesty, fairness and law. No official has the duty and freedom to knowingly and intentionally commit a crime. No one is above the law.

When a law official knowingly and intentionally commits a crime, he is no longer an official, but a criminal. A criminal has no immunity. They should be punished by our law. Former U.S. Attorney General's FBI Chief Michael Kahoe was convicted and punished by our law for his malicious destruction of evidence, coverup and obstruction of justice in the 1992 Cabin case in Ruby Ridge , Idaho. In other well know cases such as the Rodney King case in Los Angles and Malice Green case in Detroit, policemen were also convicted and punished by our law. Damage were paid to the victim.

In my case, our law enforcement officials first assisted the criminals to use false evidence, perjury and conspiracy to convict me, an innocent citizen. After the unjust charge was reversed, they maliciously destroyed all the physical evidence to cover up their criminal activities. When I filed my criminal complaint, the defendants refused to investigate and prosecute themselves. They are now protecting the felonious criminals from being prosecuted. They are turning our law upside down. They have not only covered up their own crimes and obstructed justice, but also continuously violating my constitutional rights and civil rights to have equal justice and equal protection of the laws. Their criminal activities are worse than the cases of Kahoe, King and Green. They certainly can not have immunity for their crimes.

Recently, on April 8, 1998, the Ann Arbor News of Michigan reported that Fletcher of Auburn, Wash., sued Deputy Prosecutor Lynne Kalina of Seattle, Washington for her mistake made on him. The prosecutor paid damages to the victim. The news also commented that it set a national precedent on law suits against prosecutors. (Please see attached copy.)

This case shows that a prosecutor can be sued for damage even if she made a mistake in the prosecution. In my case, the defendants have knowingly committed criminal activities and certainly can not have immunity for their crimes.

2. Your Honors state that Chow has not established that he is entitled to a declaratory judgment of unconstitutionality in light of a statute (immunity and discretion).

My response: Our constitution is the fundamental principles of our law. I would like again to point out that our law states that Immunity applies to an official's liability for his performance of his duty and discretion is an official's freedom of choice based on honesty, fairness and law. No official has the duty and freedom to knowingly, dishonestly, unfairly and unlawfully commit a crime. No one is above the law. Therefore any abusing of the law of immunity and discretion is unconstitutional.

Our constitution assures equal justice and equal protection of the laws for all citizens born or naturalized in the United States. In my complaint, our law enforcement which assisted the criminals to harm innocent citizen and then protects the criminals from being prosecuted is turning our law upside down. This is also clearly unconstitutional.

Both Michigan Civil Rights Commission and U.S. Civil Commission have supported my complaint and sent their recommendation and referral to the U.S. Department of Justice for violation of my constitutional rights and civil rights.

3. Your Honor state that finally , the district court did not err in granting defendant's motion to a stay of discovery.

My response: The district court's granting defendant's motion to a stay of discovery is essentially to cover up the defendants' crimes. The Defendants maliciously destroyed all the physical evidence seized by court without a court order to coverup their criminal activities. Now the district court fulfilled their wishful thinking by refusing to allow my attorney's request for deposition and discovery to reveal their criminal activities. Furthermore, the district court denied my repeated requests and refused to review my court verified video tape which contains important eye-witnesses, physical evidences and court documents. The result is that the district court fulfilled the defendants' wishful thinking that they unlawfully destroyed all the physical evidence and the Judge would then judge the case blindly and listen to their lies without the presence of the physical evidence of their criminal activities. This is unfair and unjust. It is also unfair and unjust for this Court to back up the lower court's unfairness and injustice.

Part 2: The truth and fact which has been overlooked and neglected by Court:

1. In the first place, this Court completely overlooked and neglected the fact that this civil complaint is based on defendants' criminal activities which have not only violated my constitutional rights and civil rights, but also ruined my life because of all the false accusations, false arrest and false Imprisonment. It is simply unfair and unjust for this Court to use the non-existent immunity in this case to cover up the defendants' criminal activities and protect them from being punished by our law. This is obstructing the justice of the victim of the crime.

2. In all your Honors' two-page comment, your Honors never mentioned one word about defendants' convicting an innocent citizen by perjury, malicious destruction of the physical evidence, coverup of felonious crimes, obstruction of justice and the violation of the victim's constitutional right and civil rights. These are all felonious crimes. This court has completely neglected them.

3. In your Honor's two-page comment, your Honor never mention one word about the physical evidence. Kmart falsely accused that Plaintiff's old shoe which had deep wears and rain splashed mud all around as its new shoes. Only a fool or mentally ill person will believe Kmart's false accusation. Yet the prosecutor could use perjury and false evidence and conspiracy to convict an innocent citizen. It is unfair and unjust for this court to use the non-existent immunity in this case to cover up the defendant's felonious crimes and obstruct the justice of the victim of the crime.

I am now again attaching a copy of photos of physical evidence of my case for your Honors' reference.

4. It is unfair for this Court to deny my request to use my Physical Exhibits, a court verified video taped eye-witnesses, physical evidence and court documents, at the oral argument (FRAP 34 (g)). It is unreasonable for the court to refuse to review this tape because the district court refused to review the tape.

Two wrongs do not make one right.

5. It is unfair that in your two-page comment, your Honors never mentioned one word of the fact that both the Michigan Civil Rights Commission and the U.S. Civil Rights Commission have supported my criminal complaint and sent their recommendation and referral to the U.S. Department of Justice. (Please see attached copies.)

6. It is unfair for this Court to overlook and neglect Michigan Honorable Judge Battani's 1991 reversal of the unjust verdict and her Honor's testimony which confirms the false accusation, false evidence , perjury and conspiracy of the Kmart case.

7. It is unfair for this Court to overlook and neglect all my State Governor and Representatives' support letters for my complaint.

8. The news media have already reported my case to the public when the unjust charge was dismissed in 1993. People are waiting for the result of my complaint. If this court denies my Motion for Rehearing, it will be unfair to the public because it will encourage the corrupt law enforcement

officials to abuse their immunity and commit crimes without being punished by our law. I am writing this letter so that it will be on the court record. Copies of this letter will eventually be also sent to the news media. I hope this Court will produce some good news for the nation-wide public.

In conclusion, my life has been ruined by the crimes and injustice of this case. I have lost my respect and human dignity from all the people who have heard my case from the news media. I need your Honors' fairness to get justice served. In less than two years, it will be the 21th century. Nowadays, our President, Congress and public, all stress eliminating racial prejudice, racial discrimination and racial hatred. If your Honors knowingly allow the extreme injustice of my case to exist, it will damage the reputation of America as a free country with equal justice for all. It will stain our judicial history. One fly can spoil a whole bowl of delicate soup. However, I have confidence in our constitution. I only need some good and honest Judges who keep their oaths to protect and support our constitution. I hope your Honors will do your duties based on honesty, fairness and law and will remand this case back to the district court to have a trial and get justice served for the victim of crime. Let us keep America beautiful.

Very truly yours,

/s/________________
Chi-Ming Chow,
Retired Mathematics Teacher,
Oakland Community College,
Michigan.

c.c.: News media and all other concerned.

SENATOR ALMA WHEELER SMITH
STATE OF MICHIGAN

November 29, 1995

The Honorable Frank J. Kelly
Attorney General, State of Michigan
Law Building, 7th Floor
525 W. Ottawa
P.O. Box 30212
Lansing, MI 48913

Dear Mr. Kelly:

It has been brought to my attention that one of my constituents, Mr. Chi-Ming Chow, has brought his case to the attention of the Department of Attorney General's Criminal Division. This is a matter of the utmost importance to Mr. Chow and a cause that he has been pursuing for a very long time.

I had the opportunity to attend a meeting with Mr. Chow, his lawyer and Robert Ianni, Assistant in Charge of the Criminal Division. From the evidence presented, it seems to me that Mr. Chow has been egregiously wronged and it is understandable that he so steadfastly pursues this matter. Regaining one's sense of dignity and self-esteem after such an unpleasant episode is important; vindication allows us to put instances of injustice behind us and resume our lives with faith in our system intact.

I will greatly appreciate your attention to his concerns and am confident that your office will give him whatever assistance it is in your power to provide.

Thank you for your consideration of this request.

Sincerely,

/s/____________________
Alma Wheeler Smith
State Senator, 18th District

AWS/ms

CITY OF ANN ARBOR, MICHIGAN
HUMAN RESOURCES DEPARTMENT

CITY OF ANN ARBOR, MICHIGAN
220 E. Huron, Suite 340,
P.O. Box 8647,
Ann Arbor, Michigan 48107
Phone: (313) 994-2803 Fax: (313) 994-2590

April 21, 1997

Mr. Chi-Ming Chow
2580 Holmes Rd #16
Ypsilanti, MI 48198-4217

RE: Civil Rights Violations

Dear Mr. Chow:

It was my pleasure meeting with you and your attorney on April 18, 1997 to discuss the unfortunate experience you had with the law enforcement agencies in the State of Michigan.

After a review of your video tape and discussion of the evidence you presented, I strongly recommend that you file formal complaints with the following agencies:

U.S. Justice Department
Civil Rights Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
Telephone: (202) 514-4224

U.S. Civil Rights Commission
624 9th Street, N.W.
Washington, DC 20525
Telephone: (202) 376-8177

Your letter dated April 3, 1997, addressed to the Michigan Attorney General's office clearly outlined your concerns. I suggest that you submit that letter to both agencies.

If I can be of further assistance, please contact me.

Sincerely,

/s/__________________
Raymond E. Chauncey
Human Rights Coordinator

cc: Joseph H. Wagner

UNITED STATES COMMISSION
ON CIVIL RIGHTS

624 Ninth Street, NW.
Washington, D.C. 20425

July 6, 1997

Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, MI 48198-4217

Dear Mr. Chow:

The United States Commission on Civil Rights recently received your complaint.

The Commission was established to conduct studies, hold hearings, issue reports, and serve as a national clearinghouse for civil rights information. As such, the Commission has no authority to provide direct remedial assistance, or offer an opinion as to the soundness of individual allegations.

In order to be helpful, we have forwarded your complaint to:

U.S. Department of Justice
Civil Rights Division
10th and Constitution Avenue, NW
Washington, DC 20530

This agency is authorized to help resolve the problem you described. We have requested that the agency notify both you and the Commission in writing concerning all actions taken to resolve your complaint. Should you need to communicate further concerning this matter, please contact the referral agency at 202-514-2151.

We appreciate the concern and the circumstances that prompted you to write to the Commission.

Sincerely,

/s/______________________
FREDERICK D. ISLER
Assistant Staff Director
Office for Civil Rights Evaluation

Petition for Rehearing - 9/4/98

(Statement Form from Kmart)

K mart CORPORATION
Loss Prevention Department

STATEMENT FORM

SPECIFIC OFFENSE RETAIL FRAUD 2ND DEGREE

CASE

STATEMENT OF JILL FEHRENBACK

ADDRESS 2095 RAWSONVILLE Belleville MI

PHONE 485-8510

AGE AND DOB 21-01-17-6

CONNECTION W/CASE WITNESS

WHERE TAKEN SHOE DEPT.

DATE AND TIME 8-13-89 1:00 PM

I Jill A. Fehrenbach witnessed Mr. Chiming Chois Try on a pair of workshoes sold in The Footwear Dept. Then he walked out of The Dept. with the new shoes still on his feet. He left his old shoes in dept on the shelf where the shoes he took are located. Mr Choi Then walked toward the front checkout with the new shoes still on.

CASE OF CHOW, CHI MING

WITNESS

The above statement is the truth to the best of my knowledge. I have made the above statement of my own free will and accord without any promise of immunity or reward and without any force or duress.

SIGNED: Jill A Fehrenb
ADDRESS 8823 Green Rd #
CITY Ypsilanti ZIP 48198
DATE 8-12-89 TIME 10:00

CODE 94-48-C—Pads-50—(Rev. 1/84)—K—Litho in U.S.A.

Exhibit 2-1

Article from Ann Arbor News - 4/8/98

The report covers vascular plants – conifers, ferns and flowering plants – but not most at risk," Brian Boom of the New York Botanical Garden said in a statement.

WORLD IN BRIEF

SEATTLE

Carpenter vindicated for false arrest

A carpenter who was wrongfully arrested and jailed has accepted a $162,500 settlement in the case that set a national precedent on lawsuits against prosecutors.

Fletcher, of Auburn, Wash., sued deputy prosecutor Lynne Kalina after he was arrested in 1993 and charged with stealing a computer from a Seattle school.

To obtain the arrest warrant, Kalina had sworn that the carpenter – who had been hired to install glass partitions at the school – had no legitimate reason to be inside it and that he later tried to sell the computer, an allegation that no witness supported. Kalina said she misread police reports.

INDIANAPOLIS

Police to search schools for guns

Following a rash of gun arrests, police will begin random searches for weapons in Indianapolis Public Schools buses and elementary schools. The district, which includes most of the city's roughest neighborhoods, has conducted similar searches of middle and high school students.

Two 8-year-old boys were arrested last month after carrying handguns to school. One student said he brought the gun to school for protection from another student. The other student allegedly pointed a gun at a classmate because she was teasing him about his ears. A third student was arrested earlier in the school year with a gun.

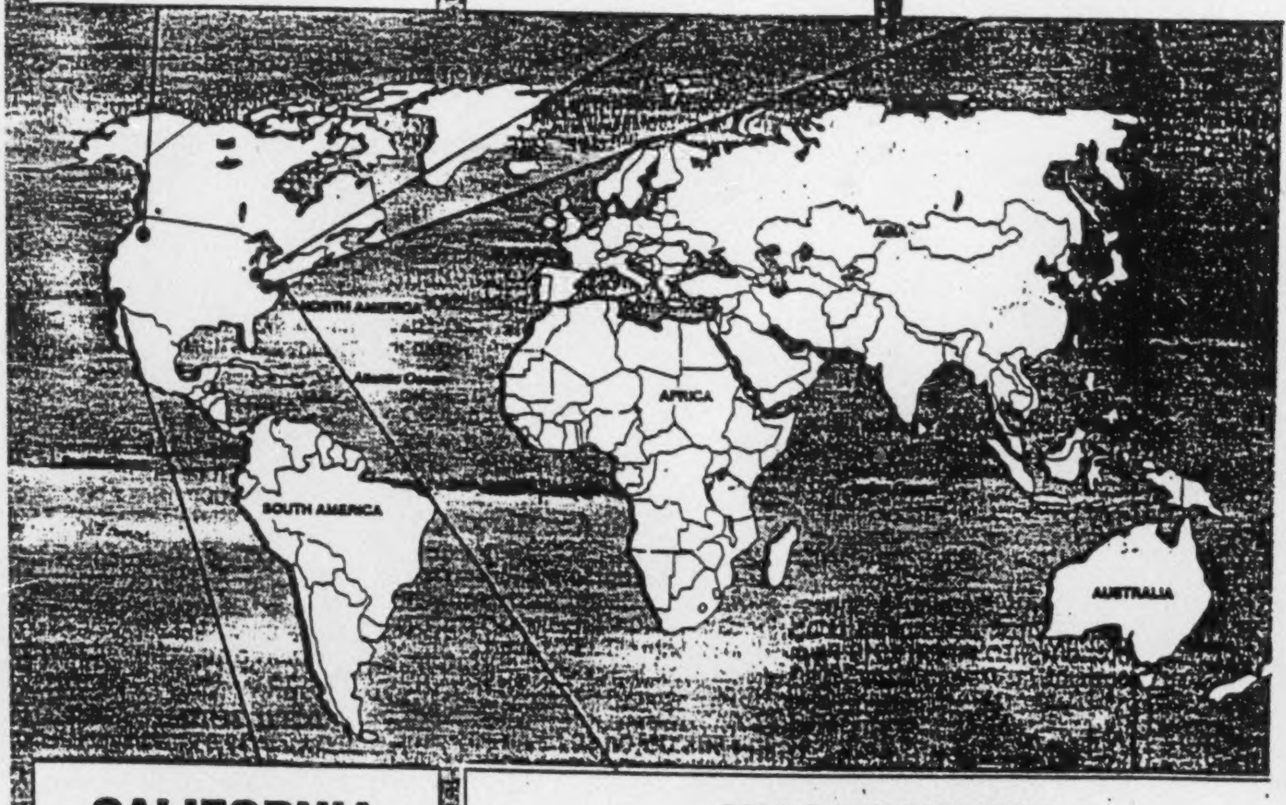
CINCINNATI

Larry Flint charged again for obscenity

Once again, it's the People vs. Larry Flynt. The Hustler magazine publisher, who beat an obscenity rap once before, was charged again Tuesday. This time, it's for videos.

Flynt and his brother, Jimmy, were indicted on 15 felony counts, including selling obscene videotapes to a 14-year-old boy, engaging in a pattern of corrupt activity and conspiracy to engage in a pattern of corrupt activity.

Last year, Flynt opened the only sex shop in town. Prosecutors did nothing – until a 14-year-old boy allegedly bought an obscene video in Flynt's store, sold it to a friend and bragged about the purchase. The boy then went to police.

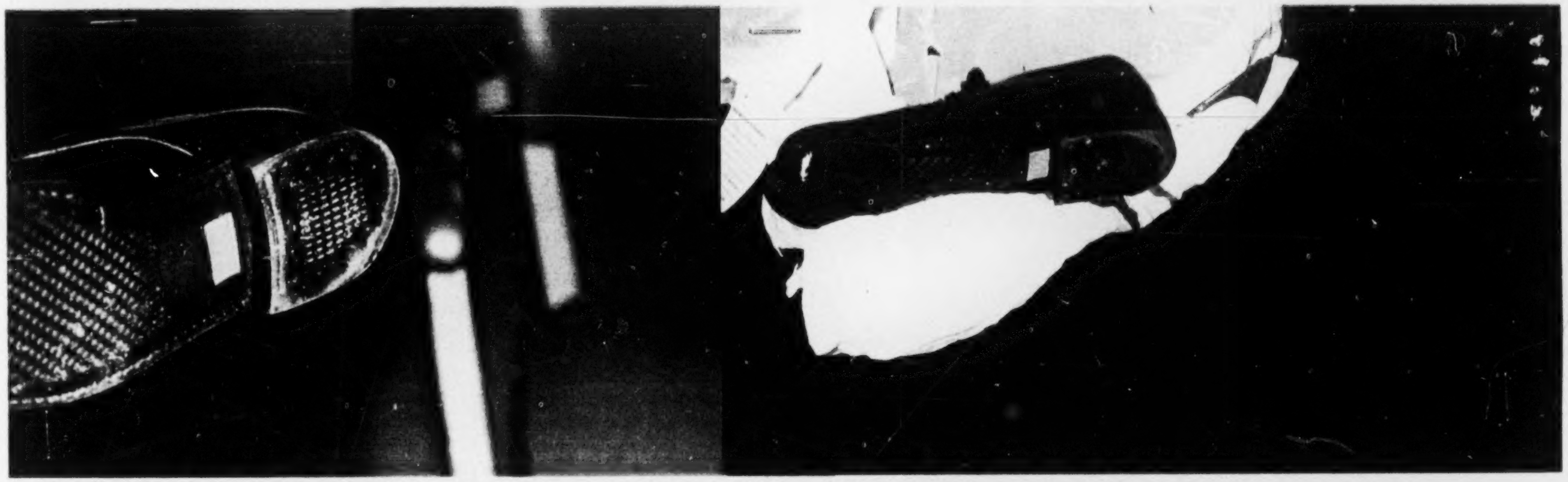


CALIFORNIA

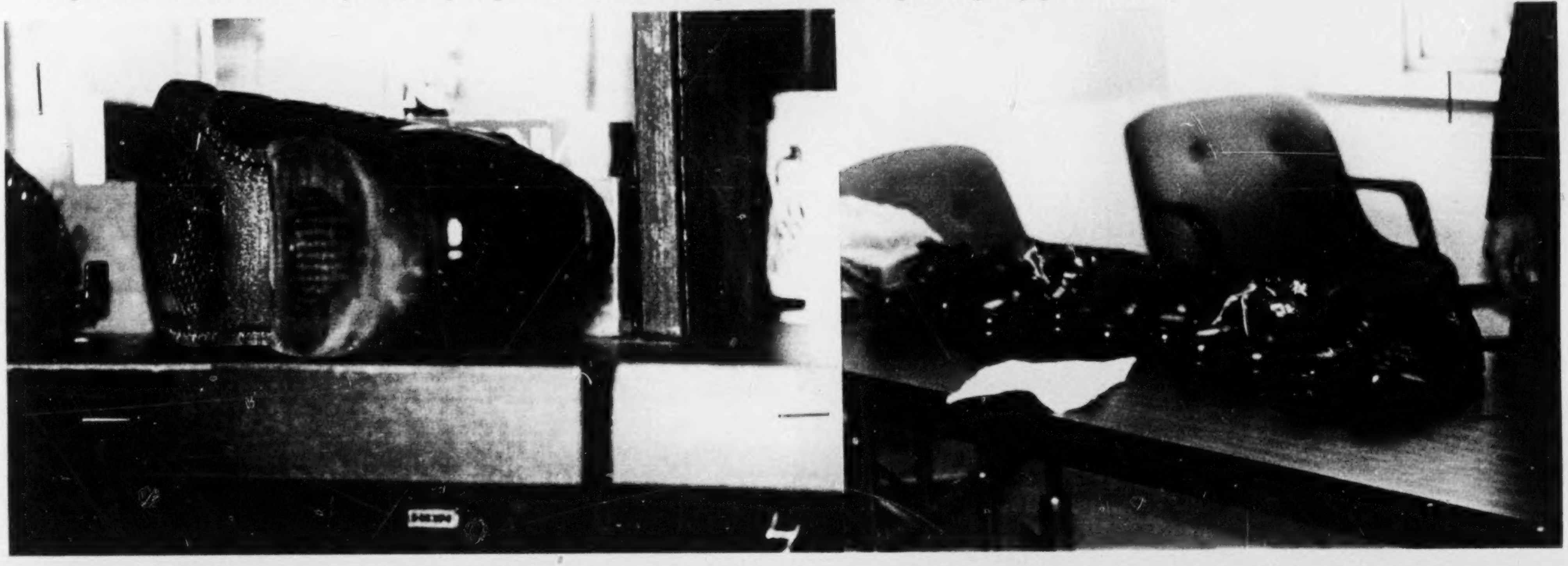
WASHINGTON

Petition for Rehearing - 9/4/98

Photo



Pictures are court verified. Court verified video taped physical evidences , eye-witnesses and court documents are available for review. In this copy, three single-shoe pictures are my old shoes alleged by Kmart as its new shoes. These pictures were taken at Police Department on 11-1-1989 before the trial. The six pairs of shoes (one in the plastic bag) (in picture are mixtures of true and false evidences) together with perjury were used to confuse or lure the jury to convict me, an innocent citizen. This picture was taken on 4-19-1991 after I won my appeal at Judge Battani's Court. Prosecutor then destroyed all these evidences without a court order while he appealed and lost. The unjust charge was later dismissed in a pretrial on 7-29-93. In 1993, I filed my complaint. I should have my constitutional rights to get my justice served.



APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR PUBLICATION

No. 97-1612

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

CHI-MING CHOW, Plaintiff-Appellant,	) On Appeal From) The United States) District Court For
v.	) The Eastern District) Of Michigan
STATE OF MICHIGAN, ATTORNEY GENERAL'S OFFICE; FRANK J. KELLY; ROBERT IANI; GEORGE E. WARD, jointly and severally, Defendants-Appellees.	))))))

BEFORE: NELSON, BOGGS and CLAY, Circuit Judges.

PER CURIAM. Appellant Chi-Ming Chow appeals the lower court's order granting Appellees' motion for summary judgment and appellee, George E. Ward's motion to stay discovery.

On appeal, Chow argues that the district court erred in dismissing his complaint based on its finding that Chow's claims were barred by the Eleventh Amendment and qualified immunity, and otherwise failed to state a claim. Chow further asserts that the district court erred in granting Ward's motion to stay discovery.

Upon review of the record and briefs of the parties, we find that Chow's claims for damages against all Appellees except Ward are barred by the Eleventh Amendment and thus this Court has no jurisdiction to hear these claims. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 66 (1989).

As to Ward, it is clear that a prosecutor who acts within the scope of his duties in "initiating a prosecution and in presenting the State's case is immune from a civil suit for damages under 1983," *See Imbler v. Pachtman,* 424 U.S 409 (1976). Accordingly, Chow's claims against Ward for his refusal to initiate a criminal investigation is similarly barred by the doctrine of absolute prosecutorial immunity.

In addition, Chow has not established that he is entitled to a declaratory judgement of unconstitutionality, in light of the fact that the statutes he attacks, M.C.L. §§ 14.28 and 767.3, are not applicable to the case at hand. Therefore, Chow does not have standing to challenge their constitutionality. *See Kardules v. City of Columbus,* 95 F 3d 1335, 1346 (6th Cir 1996) (explaining the elements needed for standing).

Finally, Ward moved to dismiss Chow's complaint based on prosecutorial immunity. A stay of discovery is properly granted until the issue of immunity is decided.

Kennedy v. City of Cleveland, 797 F2d 297 (6th Cir. 1986). Accordingly, the district court did not err in graining Ward's motion.

Because the district court, already has issued a well reasoned analysis in its April 30, 1997, Order in support of its ruling, the issuance of another detailed written opinion would be duplicative and would serve no purpose.

Accordingly, we AFFIRM the district court's order based upon the reasoning set forth in April 30, 1997, Order.[1]

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[1] The district court barred suit against Ward based on the Eleventh Amendment and qualified immunity However, Ward is a county prosecutor, and therefore, not entitled to Eleventh Amendment immunity. See *Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299, 301 (6th Cir. 1984), *cert. denied,* 469 U.S. 1113 (1985). Moreover, the claims against Ward are better resolved under the doctrine of absolute prosecutorial immunity. *See Imbler,* 424 U.S. 409 Accordingly, as to Ward, we decline to adopt the district court's reasoning as it permits to the Eleventh amendment and qualified immunity. We affirm, however, for all the other reasons given by the district court.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 96-CV-74187

CHI-MING CHOW,)
Plaintiff-Appellant,)
) [FILED APR 30, 97]
v.)
) Hon. Julian Abele
STATE OF MICHIGAN,) Cook, Jr.
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
/

JUDGMENT

On this date, the Court granted a summary judgment in the above-entitled cause. Accordingly, a judgment shall be entered in favor of the Defendants, State of Michigan, Attorney General's Office, Frank J. Kelly, Robert Ianni, and George E. Ward.

IT IS SO ORDERED.

/s/________________________
Julian Abele Cook, Jr.
United States District Court

Dated: April 30, 1997

PURSUANT TO RULE 77(d)
FED. R. CIV. P. AND
MAILED TO ALL PARTIES
DATE: 4-30-1997

/s/________________________
DEPUTY COURT CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 96-CV-74187

CHI-MING CHOW,)
Plaintiff-Appellant,)
) Hon. Julian Abele
v.) Cook, Jr.
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE; FRANK J. KELLY;)
ROBERT IANI; GEORGE E.)
WARD, jointly and severally,)
Defendants-Appellees.)
______________________________/

ORDER

On October 14, 1996, Defendants State of Michigan and Attorney General's Office filed a motion to dismiss the claims filed by the Plaintiff, Chi-Ming Chow. On October 15, 1997, Chow filed an amended complaint in which he added the individual Defendants Frank J. Kelly, Robert Ianni, and George E. Ward. Chow responded to the motion to dismiss filed by the original two Defendants on October 31, 1996. Defendant George E. Ward filed a motion to stay discovery and to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b) (6). These motions were referred to Magistrate Judge Steven D. Pepe, who, on April 9, 1997, filed a Report and Recommendation in which he recommended that the Defendants' motion be granted, and that Chow's claims be dismissed. On April 22, 1997, Chow filed objections to the Magistrate Judge's report.[1] For the reasons that are stated below, the Court will accept the recommendations within the report without modification.

I

Chi-Ming Chow is a naturalized citizen of the United States and a resident of Washtenaw County, Michigan. Prior to his retirement in 1992, he taught mathematics at Oakland County Community College for 26 years.

In August 1989, Chow planned to take a trip to Europe. He intended to take with him one of several identical new pairs of shoes that he had purchased from Kmart. In order to ensure that the new shoes that he intended to bring were comfortable, he began wearing them several weeks before his scheduled departure date of August 23, 1989. On August 12, 1989, Chow went shopping at the Kmart in Van Buren Township. After browsing in the shoe department, he decided to buy two pairs of shoes that fit him better than the pair that he was wearing. He took the shoes to the counter to pay for them. On his way out of the store, however, he was stopped by a Kmart security guard. Apparently, a saleswoman in the footwear department had called the guard, stating that Chow had taken off an old pair of shoes that he wore to the store, put on a new pair that he took off of the shelf, and placed the old shoes on the shelf, with the intention of leaving without paying for the new shoes. Chow attempted to bring the wear and usage on the shoes on his to the attention of the guard, but he refused to listen. The guard and the salewoman prepared incident reports, which were submitted to the police.

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[1] He also objected to Magistrate Judge Pepe's issuance of a order staying discovery, stating that further evidence is needed in order for him to prove his claims. However, a stay of discovery is appropriate until the merits of an immunity defense are resolved. Kennedy v. City of Cleveland, 797 F.2d 297, 298-99 (6th Cir. 1986). Thus, the magistrate judge correctly issued the stay.

After declining to accept the prosecutor's offer to drop the charges against him in exchange for a waiver of any claims that he may have against Kmart or Van Buren Township, Chow was tried and convicted of larceny under $100, for the alleged theft of the "new" shoes from Kmart. The evidence supporting his conviction included the testimony of the saleswoman and the security guard, which Chow claims was perjured. In addition, Chow claims that the prosecutor procured the assistance of the security guard in manufacturing evidence to use against him. Chow's trial attorney inexplicably failed to (1) object to the use of the manufactured evidence, (2) offer the actual shoes that Chow had worn as evidence, (3) point out the signs of wear on the shoes, (4) properly cross-examine the security guard, or (5) impeach the guard with his incident report, which contained statements inconsistent with his trial testimony.

Chow appealed to the Wayne County Circuit Court, which reversed his conviction on the ground that Chow's trial counsel was ineffective. The prosecutor appealed to the Michigan Court of Appeals, which agreed with the Wayne County Circuit Court. Chow case was remanded for a new trial, and the prosecutor was compelled to produce the shoes that Chow was accused of stealing. The prosecutor dismissed the charges against Chow when he learned that the police department had disposed of this evidence.

Finally vindicated, Chow asserts that he was the victim of a conspiracy among the prosecutor, his own trial counsel, and the Kmart employees involved, the purpose of which was to conceal (1) the incompetence of the prosecutor and police, (2) their reliance on obviously perjured testimony to obtain a conviction, and (3) the salewoman's malicious accusations against Chow.

On September 3, 1993, Chow, with the aid of his counsel, wrote a letter to Defendant George Ward, then Chief Assistant Prosecutor for Wayne County, in which he inquired about filing a criminal complaint. After obtaining more information from Chow, Ward opined that the facts alleged would not support criminal charges against the persons involved in his arrest.

Chow then filed a complaint with the Attorney General's Office in September of 1994. Defendant Robert Ianni, the Assistant in Charge of the Criminal Division of the Michigan Attorney General's Office, also found that the evidence submitted by Chow would not support criminal charges.

Chow reinterated his requests to the Attorney General's Office, and enlisted the assistance of various legislators to urge the Attorney General to investigate and pursue his complaint. He has written several letters to Governor John Engler as well, whose officer has referred Chow's complaint to the Attorney General's Office for review and evaluation.

On September 6, 1996, Chow filed a complaint against the State of Michigan and the Michigan Attorney General's Office, alleging that those Defendants violated his rights under the Fourteenth Amendment to due process and equal protection by failing to investigate his complaint of criminal activity adequately and thoroughly; and by acting arbitrarily and capriciously "in that only a vague, superfluous investigation was conducted on behalf of the Plaintiff who presented probable cause evidence that a crime had been committed." (Complaint at ¶ 29(D)). He states that he was a member of a protected class consisting of Michigan citizens who were victims of criminal activity by state officials; and that he was treated differently from citizens who were not victims of criminal actions by state officials, in that the Defendants failed to investigate or prosecute that criminal behavior on his behalf "when they routinely do it for non-crime victims within their state." (Amended Complaint at ¶¶ 23, 24). As a result, Chow claims, he has been deprived of his rights to privacy, freedom of association and to petition the government for redress of grievances.

Chow also claims that Michigan Compiled Laws §§ 14.28 and 767.3 are unconstitutional and unreasonable in that they give "too broad a discretionary power to investigate criminal complaints based upon the strength of the evidence to secure a conviction, rather than the requirement of probable cause that a crime has been committed." (Complaint § 29(E)). He seeks damages and a declaration that M.C.L. §§ 14.25 and 767.3 are unconstitutionally vague. He has not requested injunctive relief.

In his amended complaint, filed on October 25, 1996, Chow added individual Defendants George Ward, Frank Kelley and his assistant attorney general Robert Ianni. Chow alleged that Ward "did inadequately, negligently and carelessly investigate" his complaint despite his repeated requests and those of Chows State Representative. Chow does not allege any specific conduct on the parts of Defendants

Kelly and Ianni, individually. Rather, they are presumably included in his allegation that "defendants" failed to investigate or prosecute his complaint. Chow has not stated whether he is suing the individual Defendants in their official or personal capacities.

The State of Michigan, Attorney General's Office, and individual Defendants Frank Kelly and Robert Ianni have moved to dismiss Chow's complaint pursuant to Fed. R. Civ. P. 12(b) (1), 12(b) (4) and 12(b) (6). They claim that because they are entitled to Eleventh Amendment and absolute prosecutorial immunity, the Court has no jurisdiction over this action. They argue in addition that Chow has failed to state a claim under § 1983. In his motion to stay discovery and to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Defendant George Ward claims that because Chow's complaint concerns wrongful actions allegedly taken in choosing not to initiate a criminal prosecution, his claim against Ward is barred by absolute prosecutorial immunity and qualified immunity.

II

Federal Rule of Civil Procedure 12(b) permits a party to raise several defenses to a complaint, including the failure to state a claim upon which relief can be granted. In order for a complaint to be dismissed on this ground, a court must conclude "beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Carver v. Bunch, 946 F.2d 451, 452 (6th Cir. 1991) (quoting Haines v. Kerner, 404 U.S. 519, 521 (1972) (per curiam)). In making its decision, a court must liberally construe the pleadings in favor of the non-moving party and accept all well-pleaded allegations as true. Davco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 392 (6th Cir. 1975). This Rule also provides that

> [i]f, on a motion asserting the defense . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b).

A. Sovereign Immunity

All of the Defendants except for Ward have asserted that Chow's complaint should be dismissed because they are entitled to immunity under the Eleventh Amendment.

The immunity granted to states and state officials by the Eleventh Amendment may be waived only as expressly provided by either the state or by Congress, and 42 U.S.C. § 1983 does not constitute such an express waiver. Will v. Department of State Police, 491 U.S. 58, 66 (1989). Chow concedes that his claims against the state and the Attorney General's Office are barred. Thus, the Court need only consider the claims against individual Defendants Kelly, Ianni, and Ward.

A state official being sued in his or her official capacity is immune from liability for civil damages, and in order to pursue such claims, "plaintiffs seeking damages under § 1983 [must] set forth clearly in their pleadings that they are suing the state defendants in their individual capacity for damages, not simply in their official capacity. Wills v. Brown, 891 F.2d 591, 592 (6th Cir. 1989). If a plaintiff does not state in his pleadings that he is suing the defendant in his individual capacity, the court must assume that he has sue the defendant in the defendant's official capacity and his damage claims must be dismissed, inasmuch as a federal district court does not have subject matter jurisdiction over claims for recovery against a state's treasury. Id.; see also Whittington v. Milby, 928 F.2d 188, 193 (6th Cir.), cert. denied, 502 U.S. 883 (1991).

Chow objects to the magistrate judge's finding that because he did not specify in his complaint that the individual Defendants were being sued in their individual capacities, his damage claims against them should be dismissed. He states that the very nature of the alleged actions, to wit, constitutional violations, cannot be considered within the scope to the Defendants' official duties. The Court disagrees. The Sixth Circuit Court of Appeals has specifically stated that a court must assume that an individual is sued in his official capacity unless-otherwise specified. Wells, 891 F.2d at 592. Moreover, the alleged actions of the individual Defendants were performed during the course of their official prosecutorial duties. Thus, if they are to be sued in their individual capacity, Chow must so specify. Chow's damage claims against the individual Defendants must be dismissed due to his failure to name the Defendants in their individual capacity.

B. Qualified Immunity

Even if the Defendants were not protected by the Eleventh Amendment, they are entitled to qualified immunity. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme

Court, in addressing the issue of qualified immunity, declared that "[G]overnment officials performing discretionary functions generally are shielded from liability for cavil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. Therefore, in order to determine if the Defendants are immune from suit under the doctrine of qualified immunity, the Court must determine if they knowingly violated any of the Plaintiffs' clearly established rights.

Five years ago, the Sixth Circuit Court of Appeals developed a test for determining qualified immunity in the context of a summary judgment motion:

> [T]he plaintiff must effectively pass two hurdles when facing a defendant on summary judgment who claims qualified immunity. First, the allegations must "state a claim of violation of clearly established law." Second, the plaintiff must present "evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts."

Russo v. City of Cincinnati, 953 F.2d 1036, 1043 (6th Cir. 1992) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

i. § 1983

Chow has failed to state a claim of violation of a clearly established law. With regard to his claim brought pursuant to 42 U.S.C. § 1983, the doctrine of respondeat superior does not apply in a § 1983 lawsuit to impute liability on supervisory personnel. In order to find them liable, a plaintiff must allege that the supervisors condoned, encouraged or knowingly acquiesced in the alleged misconduct. Hicks v. Frey, 992 F.2d 1450, 1455 (6th Cir. 1993); Birrell v. Brown, 867 F.2d 956, 959 (6th Cir. 1989). Furthermore, mere negligence on the part of a state employee or official is not actionable under § 1983. Rather, a plaintiff must allege that the deprivation of his rights was intentional or the result of gross negligence. Davidson v. Cannon, 474 U.S. 344, 348 (1986); Jones v. Sherrill, 827 F.2d 1102 1106 (6th Cir. 1987) (negligence does not become gross simply by saying so; facts must show government officials engaged in outrageous conduct or arbitrary use of government power).

Chow has failed to show that the actions of the Defendants in failing to pursue his criminal complaint constituted outrageous conduct or arbitrary use of government power. The facts alleged support no more than negligence, if that, on the part of the Defendants.

ii. Procedural due process

Chow's procedural due process claim must also fail. As stated by the magistrate judge, Chow has not shown that he was deprived of a protected liberty or property interest under federal or state law. He has made no showing that he has an interest in the investigation of a criminal complaint.

iii. Equal protection

Likewise, Chow's equal protection claim is without merit. Selective enforcement of a statute that is fair and neutral on its face may violate the Equal Protection Clause. Thus, for example, although there is no general constitutional right to police protection, a statement may not discriminate in providing such protection. Hakken v. Washtenaw County, 901 F.Supp. 1245, 1249 (E.D. Mich. 1995). For selective enforcement to constitute a violation of the right to equal protection, it must be the result of intentional discrimination on the basis of an impermissible consideration or of an intent to punish or inhibit the exercise of constitutional rights. Futernick v. Sumpter Township, 78 F.3d 1051, 1056 (6th Cir.), cert. denied, 116 S.Ct. 1041 (1996); Wright v. MetroHealth Med. Center, 58 F.3d 1130, 1137 n. 7 (6th Cir. 1995). A showing of malice or bad faith directed at one individual, as opposed to a group of which the individual is a member, does not suffice to establish an equal protection claim. Futernick at 1058-60.

Chow has not alleged specific facts to show that the Defendants treated him differently from any similarly situated person. He has simply made conclusory allegations that he is a member of a "class" of people whose grievances are not handled correctly by the Defendants. The defining characteristic of this class, which is not based on his Chinese ancestry, is not clear. It appears that he defines the class only as those whose claims are not investigated. This is not sufficient to show that the selective enforcement alleged by Chow was the result of impermissable considerations.

The Court also finds that the remainder of Chow's claims, to wit, violation of his right to petition for redress of grievances and right of privacy and association are without merit. There is no evidence that he was denied his right to petition for redress of any grievance which he has suffered. He appealed to several individuals and agencies. The fact that his appeals were unsuccessful does not indicate that his right to petition was violated. Furthermore, Chow has not alleged facts that would establish a violation of his right to privacy.

C. Declaratory relief

Chow's sole remaining claim is one for a declaratory judgment that M.C.L. §§ 14.28 and 767.3 are so devoid of measurable standards governing the exercise of prosecutorial discretion as to violate due process. This claim must also be dismissed.

First of all, M.C.L. § 767.3, which does not impose any duties on the Michigan Attorney General or Assistant Attorney General, has no application in the present case.[2]

M.C.L. § 14.28 reads as follows:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion,

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[2] The statute reads as follows:

Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of the court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense, misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of he scope of the inquiry to be conducted, and thereupon conduct such inquiry.

> designate one of the assistant attorneys general to be known as the solicitor general, who, under his discretion, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

Chow claims that this statute gives the prosecutor the discretion to intervene only when he or she so chooses, as opposed to when justice requires intervention. This statute, however, does not address the Attorney General's duties, if any, to investigate complaints.

Prosecutors have broad discretion in determining which cases to prosecute, their power restricted only by the requirement that the decision not be based upon a defendant's race, sex, religion,

or exercise of a statutory or constitutional right. United States v. Allen, 954 F.2d 1160, 1165 (6th Cir. 1992). The Michigan statute reflects that notion and is thus constitutional.

III

In summary, the Court, having reviewed the report of the magistrate judge, concludes that he has submitted a sound basis in law and fact for his recommendations. The Court has also determined that Chow's objections have neither substantive merit nor impugn the conclusions of the Report. Hence, the Defendants' motion for summary judgment is granted, entered in favor of the Defendants.

IT IS SO ORDERED.

/s/________________________
Julian Abele Cook, Jr.
United States District Court

Dated: April 30, 1997

PURSUANT TO RULE 77(d)
FED. R. CIV. P. AND
MAILED TO ALL PARTIES
DATE: 4-30-1997

/s/________________________
DEPUTY COURT CLERK

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 96-74187-DT

CHI-MING CHOW, Plaintiff,	)
	) Honorable Julian Abele Cook
v.	) Honorable Steven D. Pepe
	)
STATE OF MICHIGAN, ATTORNEY GENERAL'S OFFICE, FRANK J. KELLEY, ROBERT IANNI, AND GEORGE E. WARD, JOINTLY AND SEVERALLY, Defendants.	) [FILED APR 9, 97]

REPORT AND RECOMMENDATION

Plaintiff filed this action under 42 U.S.C. §1983, accusing defendants State of Michigan and the Attorney General's Office of violating his constitutional rights. On October 14, 1996, defendants filed a motion to dismiss, based in part on the defense of Eleventh Amendment immunity. Plaintiff filed an amended complaint on October 25, 1996, which added as individual defendants Michigan Attorney

General Frank J. Kelley, Assistant Attorney General Robert Ianni and Assistant Wayne County Prosecutor George E. Ward. Plaintiff then responded to the original two defendants' motion on October 31, 1996. On November 15, 1996, defendant Ward filed a motion to stay discovery and to dismiss for failure to state a claim pursuant to F.R.C.P. 12(b)(6). Plaintiff filed a brief in opposition to defendant Ward's motion on December 4, 1996, and defendant Ward filed a reply. Defendants' motions were referred to me for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).[1]

BACKGROUND

The following are the facts viewed in the light most favorable to the plaintiff.

Plaintiff Chi-Ming Chow is a naturalized citizen of the United States and a resident of Washtenaw County, Michigan. Prior to his retirement in 1992, plaintiff had taught mathematics at Oakland Community College for 26 years.

In August, 1989, plaintiff was planning to take a trip to Europe. He intended to take with him one of several identical, new pairs of shoes that he had purchased from Kmart. In order to ensure that the new shoes he intended to bring with him on the trip were comfortable, plaintiff began wearing the shoes several weeks before his scheduled departure date of August 23. After about a week of wearing the shoes, on Saturday, August 12, 1989, plaintiff went shopping at the Kmart in Van Buren Township, about a 10 minute drive from his home. He spent some time in the shoe department, deciding to buy two pairs of new shoes that fit him' better, and took the two pairs of shoes to the counter and paid for them. On his way out of the store, however, he was stopped by a Kmart security guard. A saleswoman in the footwear department had called the guard, stating that plaintiff had taken off an old pair of shoes he wore into the store, put on a new pair he took off of the shelf, placed his old shoes on the shelf, and then tried to leave without paying for the new" shoes on his feet. Plaintiff attempted to point out the signs of wear and usage on the shoes, but the guard refused to listen. Plaintiff was arrested and then released on bond. The guard and the saleswoman both prepared incident reports, which were submitted to the police.

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[1] Defendant Ward's motion to stay discovery is addressed in a separate order of the same date as this report.

At the pre-trial conference, the prosecutor commented that the shoes plaintiff had allegedly stolen looked bad, and offered to drop the charges if plaintiff would agree to sign a waiver of any claims he might have against Van Buren Township and/or Kmart. Plaintiff refused this offer.

Plaintiff was tried and convicted of larceny under $100, for the alleged theft of the "new" shoes from Kmart. The evidence supporting his conviction was the allegedly perjured testimony of the saleswoman, Jill Fehrenbach, and the security guard, Fred Sweet. In addition, the prosecutor, Matthew Curtis, allegedly procured the assistance of Fred Sweet in manufacturing evidence to use against plaintiff. Plaintiff's trial attorney inexplicably failed to object to the use of the manufactured evidence, to offer the actual shoes plaintiff had worn as evidence, to point out signs of wear on the shoes, to cross-examine Sweet properly, or to impeach Sweet with his incident report (which contained statements inconsistent with his trial testimony). The record does not indicate what was done with the "old" shoes that Jill Fehrenbach allegedly found on the shelf in the shoe department, or whether they were used as evidence at the trial.

Plaintiff appealed from the district court conviction to Wayne County Circuit Court, which reversed his conviction on the ground that plaintiff's trial counsel was ineffective.[2] The prosecutor appealed to the Michigan Court of Appeals, which agreed with the Wayne County Circuit Court. Plaintiff's case was remanded for a new trial. In addition, the Court of Appeals granted plaintiff's motion to compel the prosecutor to produce the shoes he was accused of stealing -- i.e., the shoes he claims he had purchased and worn for a week before his arrest.

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[2] Plaintiff was represented by several different attorneys during the criminal proceedings. His first criminal defense attorney was a Steven Stelmach, who represented him prior to the first pre-trial conference (approximately). Mr. Stelmach was succeeded by Kurtis O'Keefe, who represented plaintiff at trial and who allegedly participated in the conspiracy -- or at least acquiesced to a very fishy deal" with the prosecutor regarding the manufactured evidence -- and whom the Court of Appeals held was ineffective in his representation of plaintiff. Another attorney, Sylvia Delin, represented plaintiff on his appeal to Wayne County Circuit Court. Other attorneys who have appeared on plaintiff's behalf include a Mr. Mullkoff, Mr. Ziem, Ms. Dagher-Margosian and Mr. Joseph Wagner. Messrs. Stelmach and Wagner appear to have continued their involvement (as witness, advisor and/or attorney) in the criminal proceedings as well as subsequent civil proceedings, including this action. In his dealings with the defendants, plaintiff initially was represented by Mr. Wagner; he subsequently retained Mr. Gregory Gliha, who currently represents him in this action.

When plaintiff's counsel contacted Matthew Curtis (the prosecutor handling plaintiff's case), however, he was informed that the shoes were not available. The police and the prosecutor found, upon investigation, that a civilian clerk in charge of the property room had disposed of the shoes after receiving a call from an anonymous male, who told her they were no longer needed by the court. The shoes apparently were sold during a police department auction.

Plaintiff's new trial counsel moved to dismiss the case against plaintiff, given that the physical evidence was gone. The district court granted the motion on July 29, 1993.

Plaintiff was now vindicated. He asserts that he was the victim of a conspiracy among the prosecutor, his own trial counsel, and Kmart employees Fehrenbach and/or Sweet, the purpose of which was to conceal the incompetence of the prosecutor and police, their reliance on obviously perjured testimony to obtain a conviction and Fehrenbach's malicious accusations toward plaintiff. On September 3, 1993, therefore, plaintiff's counsel, Joseph Wagner, wrote on plaintiff's behalf to defendant George Ward, then Chief Assistant Prosecutor for Wayne County, about filing a criminal complaint. He stated:

> I am writing on behalf of my client, Chi-Ming Chow. The enclosed documentation chronicles a most unusual case of a citizen's attempt to defend himself against false accusations that I have ever encountered. My client wishes to meet with a representative of your office to discuss his desire to file a

> complaint.
>
> I feel the evidence is substantial that he was falsely imprisoned and denied the civil rights guaranteed to all citizens under our State and Federal Constitutions.
>
> He was handcuffed by a private security guard as well as arrested without a warrant by a Van Buren Township Police Officer for a misdemeanor which did not occur in his presence. Further, his property as well as all other physical evidence was disposed of in violation of Court Order.
>
> As a former student of yours at Detroit College of Law in 1973, I hope you feel free to contact me, or perhaps someone else from your staff so that we may arrange to let my client present any necessary documentation to allow your office to make a decision about his desire to file a complaint.

After plaintiff's counsel and Mr. Ward exchanged several more letters and telephone calls, Mr. Ward requested that plaintiff and his attorney supply the facts and citations to criminal statutes that, in their view, would support a criminal prosecution against Curtis, Fehrenbach and/or Sweet. On April 20, 1994, plaintiff's counsel submitted a letter containing detailed factual allegations, citations to various statutes and an explanation of the theory of the case against those individuals. Mr. Ward was not convinced by this letter, and concluded his letter in response:

> In contending that this whole incident had to have resulted from criminal intent, not negligence or carelessness, the problem your presentation creates for me is that it does not deal adequately with a number of factors, particularly the clerk's finding old shoes among the new shoes on the rack she had re-stocked earlier that evening."
>
> Again, I believe that Mr. Chow's best approach would be to consider this civil, not criminal.
>
> However, because you have represented that the video tape is 10 minutes in duration, I will come by your office to view it for such additional information as it may provide. Please advise.

(Letter from George Ward to Gregory Gliha dated April 26, 1994, p. 2). The record does not indicate whether Mr. Ward ever viewed the video tape.

His request to the Wayne County Prosecutor's Office having been rejected, plaintiff proceeded to file a complaint with the Attorney General's Office in September, 1994. Although that office initially rejected his request (by letter dated October 5, 1994), in June, 1995, plaintiff and his counsel met with defendant Robert Ianni, Assistant in Charge, Criminal Division, Michigan Attorney General's Office, and State Senator Alma Wheeler Smith regarding plaintiff's complaint. Defendant Ianni, however, again found the evidence was insufficient to initiate a criminal investigation, as he stated in a letter to plaintiff's counsel, Gregory Gliha:

It was a pleasure meeting with you, Mr. Chow, Senator Smith and Attorney Wagner. I was truly impressed with Mr. Chow's presentation. He is a man of the highest integrity with an obvious and righteous mission to rectify an injustice which he suffered in this case.

I'm asking that you keep me informed of the progress of the civil litigation. As I indicated at our meeting, I will attempt to assist you in whatever way I reasonably can, including discussing possible immunity for any witness who in the course of the civil case raises a self- incrimination concern. We will not be initiating a criminal investigation at this time. While I am convinced of Mr. Chow's innocence in the underlying case, there is insufficient evidence to suggest that anything other than an honest, albeit incompetent, mistake may have occurred. Without the ability to subpoena witnesses and compel testimony, in my opinion, it is highly unlikely that any investigation by this office will successfully find evidence needed to prove any type of conspiracy or perjury. Much more probable, the discovery process available to you in the civil litigation will uncover the proof necessary to launch a criminal investigation. Please feel free to contact me if you have any questions or if you come across any new information.

(Letter from Robert Ianni to Gregory Gliha, dated July 10, 1995). Plaintiff reiterated his requests to the Attorney General's Office, and enlisted the assistance of various legislators to urge the Attorney General to investigate and pursue plaintiff's complaint. He has written Governor John Engler several times as well, whose office has referred plaintiff's complaint to the Attorney General's Office for review and evaluation.

It appears from one of plaintiff's letters to the Attorney General that a civil action plaintiff filed in an attempt to recover for his wrongful prosecution was dismissed by Judge Cynthia Stephens of the Wayne County Circuit Court:

> It is a conspiracy for Mr. Ianni and Mr. Steinbom to repeatedly ask my attorney to use my civil case to investigate their criminal case. IT SHOULD BE THE OTHER WAY AROUND. Because your prosecutors have covered up and refused to investigate my criminal case for two and half years, I had to file my civil case before the investigation of the criminal case in order to avoid possible statute of limitation. The ground of my civil case is based on the criminal case. Without the criminal case, the Judge of my civil case, Cynthia D. Stephens, dared to refuse to let my attorney make deposition; dared to refuse to view the physical evidence. This unfair Judge then asked my attorney to prove defendants' intention of their malicious prosecution . . . .
>
> If your prosecutor had investigated my criminal case and prosecuted the criminals,

> Judge Stephens would not have dared to dismiss my civil case . . . . . After my name was cleared in 1993, my attorney followed the court procedure and filed my criminal complaint. All I have met are your prosecutors['] resistance, cover-up and obstruction of justice. These are all criminal activities which are not within the discretion or authority of a prosecutor.

(Letter from Chi-Ming Chow to Attorney General Frank Kelley, dated March 24, 1996). Plaintiff's attorney, Mr. Gliha, wrote to Mr. Steinbom on March 28, 1996, reiterating plaintiff's request for a criminal investigation. Plaintiff sent letters to the Attorney General again on April 7 and July 23; State Senator William Van Regenmorter and Mr. Hong Xing Hu, President of the Chinese Association of Greater Detroit, wrote to the Attorney General urging him to investigate plaintiff's case, in May and August, 1996, respectively.

On September 5, 1995, plaintiff filed suit against the State of Michigan and the Michigan Attorney General's Office. He alleged that the State and the Attorney General's Office violated his rights under the Fourteenth Amendment to due process and equal protection by failing to investigate plaintiff's complaint of criminal activity adequately and thoroughly; and by acting arbitrarily and capriciously "in that only a vague, superfluous investigation was conducted on behalf of the Plaintiff, . . . who presented probable cause evidence that a crime had been committed." (Complaint, ¶ 29(D)). He states that he was a member of a protected class consisting of Michigan citizens who were victims of criminal activity by state officials; and that he was treated differently from citizens who were not victims of criminal actions by state officials, in that defendants failed to investigate or prosecute that criminal behavior on plaintiff's behalf "when they routinely do it for non-crime victims within their state." (Amended Complaint, ¶¶ 23, 24). As a result, plaintiff claims, he has been deprived of his rights to privacy, freedom of association and to petition the government for redress of grievances.

Plaintiff also claims that Michigan Compiled Laws §§ 14.28 and 767.3 are unreasonable (i.e., unconstitutional) in that they give "too broad a discretionary power to investigate criminal complaints based on the strength of the evidence to secure a conviction, rather than the requirement of probable cause a crime has been committed." (Complaint, ¶ 29(E)). He seeks damages and a declaration that M.C.L. §§ 14.28 and 767.3 are unconstitutionally vague. Plaintiff has not requested injunctive relief.

In his amended complaint, filed October 25, 1996, plaintiff added individual defendants George Ward, Frank Kelley and his assistant attorney general Robert Ianni. Plaintiff alleged that: defendant Ward "did inadequately, negligently and carelessly investigate" plaintiff's complaint despite plaintiff's repeated requests and those of plaintiff's State Representative, Kirk A. Profit; defendant Ward, " . . . despite requests by Plaintiff, Chi-Ming Chow, and his attorneys, failed to adequately investigate or to file any criminal complaints against those witnesses, prosecutors and officials who had committed criminal acts" (Complaint ¶ 14); "defendant . . . . did inadequately, negligently and carelessly investigate the matter and repeatedly declined to issue a warrant..." (Amended Complaint ¶ 11). Plaintiff does not allege any specific conduct on the parts of defendants Kelley and Ianni, individually; they are presumably included in his allegations that "defendants" failed to investigate or prosecute his complaint. Plaintiff has not stated whether he is suing the individual defendants in their official or personal capacities.

The State of Michigan, the Michigan Attorney General's Office, Attorney General Frank Kelley and Chief Deputy Assistant Attorney General Robert Ianni have moved to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(4) and 12(b)(6).[3] They claim that because they are entitled to Eleventh Amendment and absolute prosecutorial immunity, the Court has no jurisdiction over this action. They argue in addition that plaintiff has failed to state a claim under § 1983. In his motion to stay discovery and to dismiss pursuant to F.R.C.P. 12(b)(6), defendant Ward claims that because Plaintiff's complaint concerns wrongful actions allegedly taken in choosing not to initiate a criminal prosecution, Plaintiff' s claim against Defendant Ward is barred by absolute prosecutorial immunity and qualified immunity.

ANALYSIS

I. Standard of Review

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[3] Defendants State of Michigan and the Attorney General's Office filed their motion to dismiss before Messrs. Kelley and Ianni became defendants in this action. Counsel for these four defendants has addressed plaintiff's allegations as to the individual defendants in Defendants' Reply Brief, however, and has argued that the individuals as well as the State and Attorney General's Office are entitled to Eleventh Amendment and prosecutorial immunity. I will therefore consider defendants Kelley and Ianni to have adopted and/or joined the original motion to dismiss.

In deciding a motion to dismiss, "the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen,* 395 U.S. 411,421-22 (1969); W*estlake v. Lucas,* 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

II. Sovereign and Qualified Immunities

Defendants have asserted that several types of immunity -- Eleventh Amendment, absolute prosecutorial and qualified immunity -- bar plaintiff's suit against them.

A. Eleventh Amendment immunity bars plaintiff's claims for damages

All defendants except defendant Ward have asserted that plaintiff' s complaint should be dismissed because they are entitled to immunity under the Eleventh Amendment. An assertion of Eleventh Amendment immunity is a challenge to the subject matter jurisdiction of this Court. *See, e.g., Wells v. Brown,* 891 F.2d 591, 593 (6th Cir. 1989). Thus, the question whether defendants are entitled to Eleventh Amendment immunity is a threshold inquiry, which should be addressed before the Court considers any non-jurisdictional issues. In addition, this Court should address *sua sponte* whether defendant Ward is entitled to Eleventh Amendment immunity despite his omission to raise the defense.

Eleventh Amendment immunity may be waived only as expressly provided by either the State or Congress, and 42 U.S.C. § 1983 does not constitute such an express waiver. *Will v. Department of State Police,* 491 U.S. 58, 66 (1989). Plaintiff essentially concedes that his claims against the State and the Attorney General's Office are barred, leaving only the claims against defendants Kelley, Iani and Ward in dispute.

A state official being sued in his or her official capacity is immune from liability for civil damages, and in order to pursue such claims "plaintiffs seeking damages under § 1983 [must] set forth clearly in their pleadings that they are suing the state defendants in their individual capacity for damages, not simply in their official capacity." *Wells v. Brown,* 891 F.2d 591,592 (6th Cir. 1989). If a plaintiff does not state in his pleadings that he is suing the defendant in his individual capacity, the court must assume that he has sued defendant in defendant's official capacity and his damage claims must he dismissed, as a federal district court does not have subject matter jurisdiction over claims for recovery against a state's treasury. *Id.; see also Whittington v. Milby,* 928 F.2d 188, 193 (6th Cir.), *cert. denied,* 502 U.S. 883 (1991). Because the complaint in this case does not specify whether plaintiff is suing defendants in their official or individual capacities, plaintiff' s claims for damages must be dismissed.

Plaintiff's claim for declaratory relief, however, is not barred by the Eleventh Amendment. *Will,* 491 U.S. at 71 n. 10; *and see, e.g., Pelfrey v. Chambers,* 43 F.3d 1034, 1037 (6th Cir.), *cert. denied,* 115 S. Ct. 2269 (1995).

B. Qualified Immunity

Defendants assert that they are entitled to qualified immunity. Government officials performing discretionary functions are shielded from liability for civil damages unless their alleged conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). A court should resolve the immunity issue before addressing the merits of a case if the issues are separate. *Wells v. Brown,* 891 F.2d at 593.

Qualified immunity, like Eleventh Amendment immunity, protects defendants only from liability for damages. If the Court adopts the recommendation that plaintiff's damages claims be dismissed because defendants are entitled to Eleventh Amendment immunity, it need not decide whether defendants are entitled to qualified immunity. If the Court does look past defendants' Eleventh Amendment immunity, however, defendants' assertion of qualified immunity constitutes an alternate ground on which plaintiff's claims should be dismissed.

The initial question in determining whether a defendant is protected by qualified immunity is whether the plaintiff has stated a claim of a constitutional violation, *Siegert v. Gilley,* 500 U.S. 226, 232-33 (1991). In this case, plaintiff has alleged that defendant Ward negligently and carelessly failed to perform an adequate investigation of plaintiff's complaint. In addition, plaintiff claims that he was treated (presumably by all defendants) differently than citizens who were not victims of "crimes" committed by state officials; that defendants violated his due process rights by arbitrarily and capriciously refusing to prosecute plaintiff's complaint; and that his right to petition the government for redress of grievances was violated by defendants' arbitrary and capricious failure (to investigate plaintiff's criminal complaint. Finally, plaintiff claims that defendants conspired to cover up the wrong-doings of the trial prosecutor and defendant Ward "for fear they would tarnish the image of their own office as they had judicial authority over the matter." (Amended Complaint, ¶ 32).

1. Constitutional claims under § 1983 generally

The doctrine of *respondeat superior* does not apply in § 1983 lawsuits to impute liability on supervisory personnel. To find them liable, a plaintiff must allege that the supervisors condoned, encouraged or knowingly acquiesced in the alleged misconduct. *Hicks v. Frey,* 992 F.2d 1450, 1455 (6th Cir. 1993); *Birrell v. Brown,* 867 F.2d 956, 959 (6th Cir. 1989). Furthermore, mere negligence on the part of a state employee or official, moreover, is not actionable under § 1983; generally, a plaintiff must allege that the deprivation of his rights was intentional or the result of gross negligence. *Davidson v. Cannon,* 474 U.S. 344, 348 (1986); *Jones v. Sherrill,* 827 F.2d 1102, 1106 (6th Cir. 1987) (negligence does not become gross simply by saying so; facts must show government officials engaged in outrageous conduct or arbitrary use of government power).

Plaintiff has failed to state a claim that defendants violated his constitutional rights. Plaintiff has not alleged facts showing anything more than negligence on the part of any defendant in this action. With regard to defendant Ward, plaintiff expressly states that Ward was negligent, as opposed to describing a more culpable state of mind. Plaintiff has not alleged any state of mind with respect to defendants Kelley or

Ianni; and the most that may be inferred from the allegations and supporting documentation attached to plaintiff's complaint is likewise that these two individuals were negligent. Because each of his constitutional claims requires a showing of more than mere negligence on the part of the defendants, plaintiff has failed to state a claim.

Moreover, even if plaintiff could make such a showing, his claims are defective in other regards as well.

2. *Procedural due process*

To establish a violation of his procedural due process rights, plaintiff must show that he was deprived of a protected liberty or property interest under federal or state law. The interest he claims here is essentially the right to have his complaint investigated by county and state officials. Plaintiff, however,

> has no liberty interest in an investigation by defendants of his allegations of wrongdoing. "There is ... no constitutional right to an investigation by government officials." *Dept. of Investigation of New York v. Stone,* 1992 WL 25202, at *2 (S.D.N.Y. Feb. 4, 1992) (dismissing claim that DOI employees "unjustifiably delayed investigation of [plaintiff's] complaints [regarding improper termination]," and then conducted "a perfunctory, cursory and superficial investigation"); *see Scher v. Chief Postal Inspector,* 973 F.2d 682, 683-84 (8th Cir. 1992).

Bal v. New York, Unpub. op., No. 94 Civ. 4450, 1995 WL 46700, *2 (S.D.N.Y., Feb. 7, 1995), *aff'd without published op.*, 99 F.3d 402 (2d Cir. 1995). Likewise, plaintiff has no property interest in an investigation of his criminal complaint. To hold a property interest in a government benefit, for purposes of due process analysis, plaintiff must have a legitimate claim of entitlement to the benefit derived from a source of law independent of the Constitution, such as state law. *Id.* The statutes upon which plaintiff relies, M.C.L. §§ 14.28 and 767.3, do not create any such claim of entitlement in a citizen. Section 767.3 has no relevance to the issues raised in plaintiff's complaint and imposes no duties on a county prosecutor or the State Attorney General or their respective offices. Section 14.28, although it identifies certain duties and powers of the State Attorney General, contains no language making any type of investigation mandatory for the Attorney General, nor does the statute give a citizen a right to have the Attorney General undertake the investigation of a complaint.

3. *Equal protection*

Selective enforcement of a statute that is fair and neutral on its face may violate the Equal Protection Clause. Thus, for example, although there is no general constitutional right to police protection, a state may not discriminate in providing such protection. *Hakken v. Washtenaw County*, 901 F. Supp. 1245, 1249 (E.D. Mich. 1995). For selective enforcement to constitute a violation of the right to equal protection, it must be the result of an intentional discrimination on the basis of impermissible considerations; or of an intent to punish or inhibit the exercise of constitutional fights. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied*, 116 S. Ct. 1041 (1996);

Wright v. MetroHealth Med. Center, 58 F. 3d 1130, 1137 n. 7 (6th Cir. 1995); Halcken, 901 F. Supp. at 1249. A showing of malice or bad faith directed at one individual -- as opposed to a group of which the individual is a member -- does not suffice to establish an equal protection claim. *Futernick* at 1058-60.

Plaintiffs equal protection claim in this case must fail. He has not alleged specific facts to show that defendants treated him differently from any similarly situated person(s). He has simply made the conclusory allegation that, as a member of the class of victims of criminal activity by government officials,[4] his complaint was not investigated whereas that of someone who was not a member of that "class" would have been. Plaintiff has not pointed to any such individual or case, however, and it is well established that conclusory, unsupported allegations of constitutional deprivation do not state a claim.[5]

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[4] Plaintiff has stated in his complaint that he is a naturalized Chinese-American citizen. He does not allege, however, that Chinese-American citizens are a protected or suspect class, nor that he was discriminated against because he is Chinese-American. The issue whether Chinese-Americans, as an identifiable ethnic group, constitute a protected class for purposes of equal protection analysis need not be addressed here. He cites no authority to support his theory that the class in which he claims membership - victims of criminal activity by state or government officials - is a protected class.

[5] *See, e.g., Ana Leon T. v. Federal Reserve Bank,* 823 F.2d 928, 930 (6th Cir.) ("IT]he allegations must be more than mere conclusions, or they will not be sufficient to state a civil rights claim. "), *cert. denied,* 484 U.S. 945 (1987); *Chapman v. City of*

4. *Right to petition for redress of grievances*

It is well established that interference with or deprivation of the right to petition the government for redress of grievances violates the First Amendment. *See, e.g., Nestle Ice Cream Co. V. N.L.R.B.*, 46 F.3d 578, 585 (6th Cir. 1995). Denial of a person's right to access to the courts, which is included in the right to petition, *id.*, is actionable under § 1983. *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953,959 (6th Cir. 1986). Actions taken by a government official to "cover up" or conceal evidence of a wrong may constitute interference with the victim's right of

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Detroit, 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint.., to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings."); *Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985) (conclusory, unsupported allegations insufficient to state a claim); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983) (dismissal of complaint appropriate if allegations of constitutional deprivation are "mere conclusions"); *Ross v. Meagan*, 638 F.2d 646, 650 (3rd Cir. 1981) ("[T]his court has consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs."); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) ("A pleading will not be sufficient to state a cause of action under the Civil Rights Act if its allegations are but conclusions."); *Borenstein v. City of Philadelphia*, 595 F. Supp. 853, 856 (E.D. Pa. 1984) ("[C]ivil rights complaints must be pleaded with specificity and may not merely make conclusory allegations of constitutional deprivations or the existence of municipal policies. "); *Egan v. Concini*, 585 F. Supp. 801,803 (M.D. Pa. 1984) (factual specificity required in order to enable court to evaluate substance of claim.

access to the courts that is actionable under § 1983. *In re Cincinnati Radiation Litigation,* 874 F. Supp. 796, 823 (W.D. Ohio 1995); *Barrett v. United States,* 798 F.2d 565 (2d Cir. 1986); *Agresta v. Philadelphia,* 801 F. Supp. 1464, 1472 (E.D. Pa. 1992), *aff'd,* 993 F.2d 223 (3d Cir. 1993).

In this case, even if we assume that plaintiff's alleged facts -- if stretched in his favor -- might support a claim that the prosecutor at plaintiff's criminal trial (Matthew Curtis), and possibly one or more employees of the Van Buren Township Police Department, covered up evidence that the prosecution's witnesses perjured themselves when they testified against plaintiff, these individuals are not named defendants in this action. Yet, even if we assume that plaintiff could conceivably state a claim of interference with his right of access to the courts against Curtis and/or these employees, plaintiff has failed to make specific allegations to show that any of the defendants in this action -- the Assistant Wayne County Prosecutor, the Attorney General and the Assistant Attorney General - covered up evidence or interfered with plaintiff's right to file a complaint. The record he has submitted demonstrates that he filed such a civil complaint, which courts have held to be an adequate medium for petitioning for redress of grievances, *see, e.g., Bal, supra,* at *2-3; *Sheppard v. Beerman,* 18 F.3d 147, 152 (2d Cir. 1994), *cert. denied,* 115 S. Ct. 73 (1994). In addition, he petitioned the government by letter many times to redress his grievances and was not prevented or inhibited from doing so by any of the defendants. That his petitions were unsuccessful does not indicate that his right to petition was violated. Plaintiff does not have a right to have the allegedly offending parties convicted in a criminal action, prior to plaintiff's instituting a civil action against them. With the discovery tools created by the Federal Rules, moreover, plaintiff had the opportunity to perform his own factual investigation for evidence to support his claims. Plaintiff has failed to state a claim that defendants violated his right to petition.

5. *Rights of privacy and association*

Plaintiff's claim that he was deprived of his right freedom of association is totally without support, legal or factual. As a mere conclusory allegation, this claim is without merit and should be dismissed. As for plaintiff's claim that his right of privacy was violated, his disclosures to various persons of his personal information were voluntary and may not used to impose liability on defendants here.

Plaintiff has failed to allege any constitutional violations by defendants, and they are thus entitled to qualified immunity.

C. Prosecutorial immunity

Defendants argue that plaintiff's claims against them, arising out of their failure to investigate or pursue his criminal complaint, are barred by absolute prosecutorial immunity under *Imbler v. Pachtman,* 424 U.S. 409, 420 (1976) (" a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties"). In *Buckley v. Fitzsimmons,* 113 S. Ct. 2606, 125 L.Ed.2d 209 (1993), however, the Court held that prosecutors were *not* entitled to absolute immunity for acts that fall within the prosecutor's *investigatory* role. *Buckley,* 113 S. CT.. at 2616-17. Plaintiff, therefore, argues that because he is challenging actions taken in defendants' roles as investigators rather than as advocates, defendants are not absolutely immune but must establish they are entitled to qualified immunity. Because defendants are entitled to Eleventh Amendment and qualified immunity, it is not necessary to address the issue whether they are entitled to absolute prosecutorial immunity.

III. Plaintiff's request for declaratory relief

Plaintiff's sole remaining claim is his request for a declaratory judgment that M.C.L. §§ 14.28 and 767.3 are so devoid of measurable standards governing the exercise of prosecutorial discretion as to violate due process. This claim should also be dismissed.

First, as pointed out by defendants, M.C.L. § 767.3 has no application to plaintiff's case or the subject matter of this action. That section reads:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of the court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

M.C.L. § 767.3. This statute does not impose any duties on the Michigan Attorney General or Assistant Attorney General and has no application in the present case. Plaintiff, therefore, has no standing to challenge its constitutionality.

Section 14.28 provides:

> The attorney-general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, *and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in* which the people of this state may be a party or interested.

M.C.L. § 14.28. This statute gives the Michigan Attorney General the power to *intervene in* any action, before any court or tribunal, in which the people of the state are interested. It does not address the Attorney General's duties, if any, to investigate complaints regarding malicious prosecution, perjury or other wrongdoings. Even if the statute were impermissibly vague, it is not germane to plaintiff's complaint.

In any event, the Michigan statute follows a lengthy tradition in the United States of according prosecutors great discretion in deciding which cases to prosecute:

> Prosecutors are given great discretion in determining which cases will be prosecuted: "[So] long as the prosecutor has probable cause to believe that the accused committed an offense decreed by statute, the decision of whether or not to prosecute and what charge to file . . . generally rests entirely in his discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S. Ct. 663, 66869, 54 L. Ed.2d 604 (1978) (footnote omitted). The decision, however, cannot be based on a defendant's race, sex, religion or exercise of a statutory or constitutional right. *[United States v. Andersen,* 940 F.2d 593,596 (10th Cir. 1991)].

United States v. Allen, 954 F.2d 1160, 1165 (6th Cir. 1992) (holding state prosecutor's referral of case for federal prosecution did not violate due process despite absence of objective standards governing such referrals). *See also, Gov't of the Virgin Islands v. Kramer,* 636 F. Supp. 458, 460 (D. Virgin Islands, 1986) (holding statute vesting complete discretion in prosecutor to recommend or deny any offender for participation in community service program is constitutionally permissible; the court noted that the long and widely accepted concept of prosecutorial discretion derives from the constitutional principle of separation of powers. The existence of great prosecutorial discretion does not offend the Constitution; only the selective application or enforcement as a result of intentional or purposeful discrimination is a constitutional violation of due process. Plaintiff's request for declaratory relief should therefore be denied.

RECOMMENDATION

For the reasons stated above, it is recommended that defendants State of Michigan, Michigan Attorney General's Office, Attorney General Frank Kelley, Assistant Attorney General Robert Ianni and George Ward's motions to dismiss plaintiff's complaint be granted.

Any objections to this Report and Recommendation must be fried within ten (10) days of its service. 28 U.S.C. §636(b)(1); E.D. Mich. L. 72. l(d)(2). Failure to file objections within the specified time constitutes waiver of any further right of appeal. Thomas v. Am, 474 U.S. 140 (1985); *Ivey v. Wilson,* 832 F.2d 950, 957-58 (6th Cir. 1987); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). Pursuant to E.D. Mich. L. 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed Objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Dated: April 9, 1997
Ann Arbor, Michigan

/s/____________________
STEVEN D. PEPE
UNITED STATES
MAGISTRATE JUDGE

APPENDIX G

DOCUMENTS RELEVANT TO THE PROCEEDINGS

CITY OF ANN ARBOR, MICHIGAN
HUMAN RESOURCES DEPARTMENT

CITY OF ANN ARBOR, MICHIGAN
220 E. Huron, Suite 340,
P.O. Box 8647,
Ann Arbor, Michigan 48107
Phone: (313) 994-2803 Fax: (313) 994-2590

April 21, 1997

Mr. Chi-Ming Chow
2580 Holmes Rd #16
Ypsilanti, MI 48198-4217

RE: Civil Rights Violations

Dear Mr. Chow:

It was my pleasure meeting with you and your attorney on April 18, 1997 to discuss the unfortunate experience you had with the law enforcement agencies in the State of Michigan.

After a review of your video tape and discussion of the evidence you presented, I strongly recommend that you file formal complaints with the following agencies:

U.S. Justice Department
Civil Rights Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
Telephone: (202) 514-4224

U.S. Civil Rights Commission
624 9th Street, N.W.
Washington, DC 20525
Telephone: (202) 376-8177

Your letter dated April 3, 1997, addressed to the Michigan Attorney General's office clearly outlined your concerns. I suggest that you submit that letter to both agencies.

If I can be of further assistance, please contact me.

Sincerely,

/s/_________________
Raymond E. Chauncey
Human Rights Coordinator

cc: Joseph H. Wagner

April 14, 1997

Chi-Ming Chow (Mr.)
2580 Holmes Road, No. 16
Ypsilanti, Michigan 48198-4217
(313-484-0294)

Mr. Chauncey
Michigan Civil Rights Commission
Suite 340
220 East Huron
Ann Arbor, Michigan
(313-994-2803)

Dear Mr. Chauncey:

Thank you for your appointment for me to meet you on this coming Thursday, April 17, 1997 at 10 a.m.. My grievance is regarding the violation of my right to have equal justice and equal protection of the laws.

Enclosed please find the following documents as a reference of my case:

1. My recent correspondence with Attorney General's law official between March and April of 1997.

2. A copy of my "To Whom It May Concern" letter of September 14, 1993. This is a comprehensive summary of my case.

3. A copy of my complaint filed at Michigan Attorney General's office and some correspondence between my attorneys, myself and Attorney General's law officials.

4. Copies of letters written by Honorable Governor Engler, U.S. Senator Levin, U.S. Senator Abraham, U.S. Congresswoman Rivers, State Senator Smith, State Representative Profit and State Senate Judicial Committee to Attorney General Kelley asking him to give a full and fair investigation of my complaint. (They got no response.)

5. A copy of court verification of my video taped evidence including photos copies. (A 1993 TV 2 interview was added at the end of this tape.)

I shall bring my video tape to your office this coming Thursday so that we can review it together and discuss my complaint.

Attorney Joseph H. Wagner (313-485-6767) will join our meeting. He helped me file my criminal complaint at the prosecution office. He was also in my video tape for a TV 2 interview in 1993. He knows my case well and can be helpful for our meeting.

Thank you again for the appointment.

Very truly yours,

Chi-Ming Chow

c.c.: Attorney Wagner

Documents Relevant to the Proceedings

April 3, 1997

Chi-Ming Chow (Mr.)
2580 Holmes Road, No. 16
Ypsilanti, Michigan 48198-4217
(313-484-0294)

Honorable Frank J. Kelley
Michigan Attorney General
525 W. Ottawa
P.O. Box 30212
Lansing, Michigan 48909-0212
(517-373-1110)
(FAX 517-373-3042)

Re: My complaint against Attorney General's Department

Dear Honorable Attorney General Kelley:

I have received Mr. Ianni's letter of March 31, 1997 regarding my request for a meeting to discuss my grievance. (Please see attached copy.) My comment for his letter is as follows:

1. In the first place, my current complaint is more than just against the Wayne County Prosecutor. It is now against your department for all the felonious criminal activities committed by your law officials. Their crimes include assisting criminals, false accusation, false arrest, perjury, false evidence, conspiracy, wilful neglect of duty, malicious destruction of physical evidence seized by court without a court order, coverup, obstruction of justice and violation of citizen's constitutional right. All these crimes have been recorded on court verified photos, video tape and court

document. Your office has continuously covered up this scandal for more than three years since I filed my complaint on September 8, 1993. All the coverup, obstruction of justice and violation of my constitutional right are continuing. Time will not make them disappear. It will only make them worse.

2. Mr. Ianni states that only my attorney can discuss my complaint with your official. This is simple not true. It is the law that a victim of crime has the right to file his complaint at your prosecution office and discuss his complaint with the prosecutor. Also, you are an elected government official. Your constituent certainly has the right to write to you. I have not written to your law officials for a long time since I found out that they were unfair and unreasonable. Nowadays I only write directly to you. My last letter was addressed to you. I did not ask Mr. Ianni to write to me. During the past years, two of my attorneys. already wrote numerous letters to your office asking you to investigate my complaint. They got no result . Let my attorney write to your corrupted official again will only waste my time and money.

3. For the past years, all my Honorable Governor, five Representatives and State Senate Judicial Committee have reviewed my complaint and asked you to investigate my complaint. Especially, on June 23, 1995, our Honorable Senator Smith had a meeting in your office. After the meeting, her Honor wrote to you: ". . . . From the evidence presented, it seems to me that Mr. Chow has been egregiously wronged and it is understandable that he so steadfastly pursues this matter . . . "Her Honor asked you to investigate my complaint and recover the dignity of my life. Mr. Ianni was at this meeting. A picture was taken after the meeting by another law official with my camera.

4. Your corrupted law officials argued before that in 1993, the charge of my case was dismissed on a technicality. This argument is a conspiracy to cover up their criminal activities and ruin my normal life. Your law officials should know that although they have unlawfully destroyed all the physical evidences to cover up their crimes, I still have the court verified video taped physical evidence and court document to back up my criminal complaint. I can never give up my effort to recover the dignity of my life and get the justice served.

5. Your law officials are paid by tax to protect the people. However, in my case, they did just the opposite. They Knew the law and knowingly violated the law. This scandal is already existent. It will be unintelligent for any one to *try* to cover it up. I hope you will make your own decision to clean up this scandal in your department. Asking your corrupted law official to investigate themselves will only waste your time and make it worse.

6. United States Justice Foundation (USJF) has asked you to investigate my complaint. USJF is a nation-wide, non-profit private organization whose goal is to preserve the constitution and help victim win justice. It is supported by the public. I hope you will respect its dignified goal. USJF is now trying to get help form U.S. Attorney General's office by pursuant to the United State Government Manual for prosecutes "selected case against Federal, State, and local officials" (Id., Page 356). Violation of citizen's constitutional right is also a violation of Federal law. USJF has also considered a possible news release. If the corruption in your department is investigated by the U.S. Attorney General or it is opened to the public, you will certainly be responsible and involved in this scandal. I hope you will be aware of all the

information I have sent to you ahead.

If any of my statement in this letter is too blunt, it is because r have suffered injustice and humiliation for so long since !989. I simply can not and do not have the mood to find any good word for those criminals and corrupted law officials who are ruining my life. I hope you will understand.

Finally, I hope your Honor or one of your loyal law officials who is honest and fair without racial prejudice to hold a meeting to discuss my complaint so that the investigation of my complaint can be started.

Your Honor's reply will be appreciated.

Very truly yours,

/s/________________
Chi-Ming Chow

c.c.: Mr. Snider, USJF
All other concerned.

Documents Relevant to the Proceedings

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL
FRANK J. KELLEY

March 31, 1997

Mr. Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, MI 48198-4217

Dear Mr. Chow:

Deputy Attorney General Stanley D. Steinbom has asked me to reply to your most recent correspondence requesting an opportunity to meet with Attorney General Kelley to discuss your grievances with the Wayne County Prosecutor, the local police department, and the KMart Corporation. For the reasons set forth in detail in Mr. Steinbom's letter of April 2, 1996, our office is not inclined to discuss this matter further with you tn any manner. As we indicated in that letter, you are represented by counsel and the ethical rules do not permit us to engage in any conversation with you on the merits of your case except through your attorney. I regret that we cannot be of any further assistance.

/s/_________________
Robert Ianni
Assistant in Charge
Criminal Division
517-334-6010

RI:dev
c: Mr. Gregory Gliha

STATE OF MICHIGAN
COURT OF APPEALS

LANSING

TO ATTORNEYS OF RECORD:

Enclosed with this letter is the decision and opinion in the entitled matter. We are releasing this opinion today.

Under MCR 7.215(A), no "per curiam" or "memorandum" opinions are published unless one of the judges of the panel deciding the case directs the reporter to do so. The words "For Publication" appear on the face of opinions of this type which are going to be published. Opinion not designated for publication at the time of release are printed on pink paper. Note that the official date of the filing of this opinion is the date stumped on it. Under MCR 7215(H), this opinion is the judgment of the Court of Appeals. All time periods for further action under the rules will run from the date stamped on the opinion. See MCR 7.215(H) and MCR 7.302(C)(2)(b).

I hereby certify that the annexed is a true and correct copy of the opinion filed in the record of the Court of Appeals in the entitled matter and that the date stamped thereon is the actual date of filing.

Sincerely,
Ella Williams
Chief Clerk

Encl.
cc: Trial Judge or Agency

(Exhibit 20-0)

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

PEOPLE OF VAN BUREN)
TOWNSHIP,) June 1, 993
Plaintiff/Appellant,)
) No. 138761
v.)
)
CHI-MING CHOW,)
Defendant/Appellee.)
______________________________/

Before: Corrigan, P.J., and Shepherd and McDonald, JJ.

PER CURIAM

Defendant was convicted after a jury trial in 34th district court of larceny under $100, in violation of Van Buren Township ordinance §603. He appealed as of right to the Wayne Circuit Court and won a new trial. The people appeal by leave granted. We affirm.

On the night of August 12, 1989, defendant went to a K mart in Van Buren Township to purchase shoes. A store employee observed defendant enter the shoe department wearing a very old pair of shoes and leave wearing new shoes from a rack she had recently restocked. She alerted a store security guard who observed defendant walking around the store for some ten or fifteen minutes. He seemed to be scuffing the heels of the shoes. Defendant paid for other merchandise in his shopping cart, including two pairs of shoes identical to those he had allegedly put on. He did not pay for the shoes he was wearing. Defendant was arrested and charged with shoplifting. The K mart employee found a pair of old shoes, which she identified as those defendant had worn on entering the department, among the new shoes on the rack she had restocked earlier that evening.

At trial defendant essentially asserted that the shoes he was wearing on August 12 had been previously purchased and worn about one week. Seeking to rebut the defense, the prosecutor introduced two additional pairs of shoes identical to the stolen shoes. The store security guard wore one pair (Exhibit 15) for about ten minutes to duplicate the defendant's actions of walking around the store and scuffing the heels. The guard had worn the other pair of shoes (Exhibit 17) for approximately one week. Defendant's trial counsel failed to object to the admission of Exhibits 15 and 17 and failed to examine the store security guard about his experiment.

The circuit court granted relief, finding trial defense counsel ineffective because he failed to object to Exhibits 15 and 17 and failed to introduce other evidence favorable to defendant.

In resolving ineffective assistance claims, we follow Strickland v. Washington, 466 US 688, 104 S Ct 2052; 80 L Ed 2d 674 (1984);

> To establish a claim of ineffective assistance of counsel, the defendant must how that counsel's performance was deficient and that under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. Second, the deficiency must be prejudicial to the defendant. [People v.

Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991).]

See also e.g., People v. Butler, 193 Mich. App. 63, 66-67; 483 NW2d 430 (1992). Counsel "has a duty to bring to bear such skill and knowledge as will render the trial's reliable adversarial testing process." People v. Armendarez, 188 Mich. App. 61, 74; 468 NW2d 893 (1991), citing Strickland supra at 688.

[p. -2-]

(Exhibit 20-1)

Plaintiff initially argues that trial counsel's failure to object to the admission of boots worn by the security guard was not ineffective because the test boots would have been admissible in evidence. We disagree. The rules governing the admission of physical evidence require a proper evidentiary foundation. The articles must be identified as that which they purport to be and must be connected with the crime or with the accused. People v. Furman, 158 Mich App 302, 331; 404 NW2d 246 (1987). Because exhibits 15 and 17 had no connection with either the crime or the accused, they were not admissible as physical evidence. People v. Stapf, 155 Mich App 491, 496; 400 NW2d 656 (1986) (admission of gun to show that toy gun defendant had shown to victim looked like a real gun was error).

Plaintiff apparently introduced the shoes as evidence of an experiment. That is, the shoes seized from defendant were to be compared with the shoes worn by the guard for two stated lengths of time, under two different conditions (i.e., one pair worn briefly inside the store and the other worn extensively outside it). Experimental data are admissible if the tests from which the data are drawn involved conditions sufficiently similar to those involved in the particular case to assist the trier of fact in reaching its conclusions. Muniga v. General Motors Corp., 102 Mich App 755, 759; 302 NW2d 565 (1980), citing Smith v. Grange Mutual Fire Ins. Co. of Michigan, 234 Mich 119; 208 NW 145 (1926). The similarity need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. Jenkins v. Frison Building Maintenance Co., 166 Mich App 716, 719; 421 NW2d 275 (1988); quoting 1 Wigmore on Evidence, §442 (internal citations omitted). A reasonable or substantial similarity is sufficient. Id, quoting 22 CJ, p 759. See also, e.g., Osner v. Boughner, 180 Mich App 248, 260; 446 NW2d 873 (1989). Before test results can be admitted a foundation must be laid showing that the test in question properly duplicated the actual conditions. Duke v. American Olean Tile Co., 155 Mich App 555, 560; 400 NW2d 677 (1986). The burden is on the party presenting the evidence to prove that similar conditions exist. Id at 561.

The decision whether to admit evidence is left to the discretion of the trial court. People v. Taylor, 195 Mich App 57, 60; 489 NW2d 99 (1992). People v. Spearman, 195 Mich App 434, 445-446; 491 NW2d 606 (1992). This is not a case where an objection to the test pairs of shoes would have been futile. While the court might have ruled that the shoes should be admitted, it might well have ruled that they should not. We agree with the court below that counsel's decision to forego objection was a significant omission which prejudiced defendant.

Defense counsel also failed to pursue issues relating to the weight of the evidence; see, e.g., Jenkins, supra at 719 (lack of identity of conditions goes to weight of evidence). As the circuit court observed, the record does not establish whether the security guard was similar in height and weight to defendant. Because the relative condition of the new and the worn shoes was central to the defense, this omission also deprived defendant of a fair trial.

Plaintiff argues that counsel's decision was a matter of trial strategy. The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Tommolino, supra at 17. Allowing the shoes to be admitted might arguably have been a strategic decision, but failing to cross-examine about the test conditions (some of which had been brought out on direct examination) was not. Defendant has overcome the presumption that counsel's action "might be considered sound trial strategy." Id (emphasis supplied).

Defense counsel also completely failed to attempt to impeach the store security guard with an incident report he had prepared. The guard testified at trial that he had seen defendant scuffing the heels of the stolen shoes while he walked around the store. However, he omitted any mention of this unusual behavior in his contemporaneously filed incident report. Counsel also failed to pursue the store clerk's acknowledgment that she attended Oakland Community College. Defendant served on the faculty of that institution. Defense counsel thus neglected the issue of possible witness bias in a case where credibility was crucial. Counsel's failure to explore credibility was also significantly prejudicial.

The issues relating to alleged prosecutorial misconduct raised in defendant's supplemental brief were not argued before the court below and thus are not properly before us. We see no evidence whatever of any conspiracies.

[p. -2-]

(Exhibit 20-2)

Affirmed. Case remanded to the 34th District Court. We do not retain jurisdiction.

/s/Maura D. Corrigan
/s/John H. Shepherd
/s/Gary R. McDonald

---

[1] All the trial exhibits, including defendant's own shoes, were sealed in an evidence box afar the trial and stored at the Van Buren Township Police Department in April 1991, Defendant videotaped all the evidence before it was stored. In October 1991, defendant flied a motion in this Court to have the court view the physical evidence at oral argument. That motion was denied, without prejudice to renewal in front of the panel to which the case was assigned. In March 1992, defendant filed a motion to compel the prosecutor to produce the exhibits. The motion was granted, but when an employee of plaintiff inquired at the police department on September , 1992, he was informed by plaintiff's counsel that the box could not be located.

An investigation determined that the box had been sent to the circuit court for its review in 1991. A civilian clerk who retrieved the box after the appeal was not aware that a retrial had been ordered and believed that the case was closed. Consequently, the evidence was disposed of in a departmental auction on August 29, 1992. Defendant subsequently moved to dismiss the appeal, but that motion was denied. Defendant then moved to have the panel view the videotape of the shoes at oral argument. That motion was also denied, but this Court did permit defendant to file portions of the tape. The Court has examined that tape in its review of the record. On the record before us, we find no evidence that the auction of the evidence was not in good faith.

Note (1996)

Michigan Court Of Appeals' decision on prosecutor's appeal for this case was to deny the prosecutor's appeal and remand the case back to 34th district court for a new trial. On the court decision, at the end of page 2, it states:

> The issues relating to alleged prosecutorial misconduct raised in defendant's supplemental brief were not argued before the court below and thus are not properly before us.

Indeed, when this case was in lower court, Wayne County Circuit Court of Appeal, all physical evidences still existed, and the unlawful auction and conspiracy to cover up the crime had not occurred yet. Therefore, it is not proper for the higher court to make comment on these issues. In order to avoid a precedent in a publication, this decision of court order was unpublished and it omitted the conspiracy and destruction of evidence without explanation.

For detail of this case, please refer to my "To Whom It May Concern" letter of September 14, 1993.

/s/____________________
Chi-Ming Chow

STATE OF MICHIGAN
IN THE 34TH DISTRICT COURT
FOR THE COUNTY OF WAYNE

THE PEOPLE OF VAN BUREN TOWNSHIP, Plaintiff,	) FILE NO. C894032)) Hon. Henry) Zaborowski
v.	)
CHI-MING CHOW, Defendant.	)))

Thomas R. Bidrri P41618
Prosecuting Attorney
2000 Town Center Drive
Suite 900
Southfield, MI 48075-1100

JOSEPH H. WAGNER P-25408
Attorney for Defendant
432 West Michigan Avenue
Ypsilanti, MI 48197
(313) 485-6767

ORDER DISMISSING

At a session of said Court held in the 34th District Court this, 29 day of July 1993.

PRESENT: Honorable Henry Zaborowski, District Court Judge

This matter having been brought on by motion of counsel for Defendant and the Court being fully advised in the premises; to-wit: the physical evidence having been disposed of;

NOW, THEREFORE;

IT IS HEREBY ORDERED AND ADJUDGED that the above entitled matter is hereby dismissed.

/s/______________________
Hon. Henry Zaborowski
District Court Judge

A TRUE COPY
34TH DISTRICT COURT
BY /s/_________________
Staci L. Brooks, Clerk

(Exhibit 21)

Documents Relevant to the Proceedings

MICHIGAN COURT OF APPEALS' 1993 VERIFICATION OF CHI-MING CHOW'S VIDEO TAPE RECORDING.

Court of Appeals
State of Michigan

ORDER

PEOPLE OF VAN BUREN TWP	) Maura D. Corrigan
	) Presiding Judge
v.	)
	) Docket # 138761
CHI-MING CHOW	) LC# 90-019210 AR

On its own motion, the Court amends its order of April 22, 1993, as follows:

The Court orders that the motion for a special meeting to view the video tape is denied.

The Court further orders the appellee to submit a copy of the video tape within seven (7) days of the Clerk's certification of this order for this Court's review. The appellee is directed to delete from the video tape those portions to which the appellant has objected, all appellant's objections being well-taken.

A true copy entered and certified by Ella Williams, Chief Clerk, on

April 28, 1993
Date

/s/
Ella Williams
Chief Clerk

LAW OFFICES OF
WILLIAM E. ZIEM, P.C.
990 DECKER ROAD
WALLED LAKE, MI 48090
TELEPHONE (313)624-63320

April 27, 1993

Court of Appeals
900 First Federal Building
Detroit, MI 48226

Re: People of Van Buren Township v. Chi-Ming Chow
Docket No: 138761

Dear Clerk,

Enclosed please find five copies of my client's video tape which has been edited per the order dated April 22, 1993, my client's letter with exhibits which explain the minutes of the video tape and a Proof of Service.

Please contact me if you have any questions.

Sincerely,

/s/________________
William E. Zeim

Enclosures

cc: Matthew G. Curtis, Atty.

Documents Relevant to the Proceedings

Re:	Michigan Court Of Appeals case: 138761.
Subject:	Newly edited video tape.
Date:	April 27, 1993.

Today, April 27, 1993, I, the Appellee, respectively submit 5 newly edited video tapes ordered by this Honorable Court on April 22, 1993. The new video tapes is used as a substitution for the physical evidence of this case destroyed by the prosecutor. The following statement is a description of the contents of the newly edited video tape:

1. 0 - 4 min.: This section of the tape shows one of the two pairs of new shoes purchased by Appellee from Kmart on August 12, 1989, the day of the incident. Its size is 6 ½. The purchase receipt is attached to the shoes. This section was recorded at Appellee's home before the trial of 5-18-90. The surfaces of the new shoes are shining and smooth without wrinkles. The sides and bottoms of the new shoes are clean and flat. This pair of new shoes was originally planned to be used as a comparison with my old shoes in court. (More information regarding this pair of new shoes will be given in the last section of this tape.)

2. 4 - 7 min.: This section shows Kmart's first eye-witness report of the incident of August 12, 1989. It was written and signed by saleswoman Jill Fehrenbach right after the incident. Her report is as follows: –

> I, Jill A. Fehrenbach witnessed Mr. Chiming Chow tried on a pair of work shoes sold in the Footwear Dept. Then he walked out of the Dept. with the new shoes still on his feet. He left his old shoes in dept. on the shelf where the shoes he took are located. Mr. Chow then walked toward the front checkout with the

new shoes still on.

(Remark: The distance between the shoe-shelf and front checkout is about 75 steps and it takes about 1 minute to walk through. It is impossible to change a pair of shining new shoes into my well worn off one-week old shoes splashed with mud by walking 1 minute on Kmart's polished floor. After finding the condition of my old shoe, Fehrenbach testified in trial of 5-18-90 that Mr. Chow scuffed his shoes from department to department and was followed by Kmart's security police, Fred Sweet, for 15 minutes. All the physical evidence and her totally contradictory testimonies are facts of her false accusation and perjury in court.)

3. 7 - 8 min.: This section shows photos of my old shoes and Kmart's old shoes taken from Van Buren Police Department Detective Green's office on 11-1-89. Kmart's old shoes are shown one half out of a bag. All others are photos of my old shoes. There are clear worn off signs and pieces of grass mixed with mud on the bottom of my old shoes. There are also wrinkles and splashed mud on the surfaces and sides of my old shoes. These photos are on files of 34th District Court, Van Buren Township Prosecutor's office, Wayne County Circuit Court Of Appeals and Michigan Court Of Appeals.

4. 8 - 14 min.: This section was recorded in the Van Buren Police Department on 5-4-90 just before the trial of 5-18-90. Attorney O'Keefe, an unnamed police officer of VBPD and myself are the three eye-witnesses of this recording. At that time, there were just two pair of shoes as evidences of this case. One pair was Kmart's old shoes sealed in a plastic beg

by State Police Laboratory. This is because after the finger print test which did not find my finger print on Kmart's old shoes, the Laboratory sealed them in a plastic bag so that no new finger print could be added on them. Therefore it is very easy to identify the second pair of shoes, a pair of my old shoes which is not in a bag. At the beginning of this section, the picture clearly shows that the front inner sides of my old shoes are splashed with mud. There are also a lot of mud spots on the sides and real ends of the shoes. This is because I once ran through heavy rain just one day before the incident. The worn off signs as indicated in previous photos section are also clearly shown. Some mud mixed with grass are shown on the bottom of the shoes. The deep wrinkles and scratches are also clearly shown on the surfaces. The evidence of a pair of one-week old shoes worn outside of the store is obvious and can be verified by naked eyes.

5. 14 - 24 min.: This section was recorded at Hon. Judge Battani's jury room on 4-19-91 after a new trial was ordered by her Honor on February 1, 1991. My attorney, Mr. Stelmach, Prosecution official, Mr. Otis, and myself are the three eye-witnesses of this recording. In this recording, there are 7 exhibits. They are 1 Kmart Fehrenbach's report of 8-12-89 and 6 pair of shoes. 5 pairs are of the same brand. To make it clear, the 7 exhibits are stated as follows:

> People's Court Exhibit 1 is Kmart's old shoes sealed in a plastic bag.
>
> People's Court Exhibit 2 is my old shoes. Now they are tied together by shoe laces. Its size, 7, is shown inside of the shoes. All the worn off signs, splashed mud, pieces of grass, deep wrinkles and scratches on my old shoes are also recorded.

People's Court Exhibit 16 is my size 6½ new shoes. The purchase receipt of 8-12-89 is still attached to this pair of new shoes. They were planned to be used for comparison with my old shoes during a live demonstration in front of the jury. This plan was not carried out because of the prosecutor's conspiracy.

People's Court Exhibit 14 is Kmart Fehrenbach's report of August 12, 1989. The physical evidence of my old shoes proves that her report was a false accusation.

People's Court Exhibits 15 and 17 are Kmart's two pairs of used shoes (size 10) produced by the prosecutor during the trial of 5-18-89. They were false evidences because they are contradictory to two original reports written by Kmart's two eye-witnesses under no pressure whatsoever with their fresh memories right after the incident of 8-12-89. These false evidences were created by the prosecutor. They were then mixed with the true evidence to confuse the jury.

People's Court Exhibit 3 is a pair of new shoes (Size 10 ½) added by my trial counsel. It only added more confusion during the trial.

After recording all the 7 exhibits, I, the Appellee, sealed them in an evidence box. On the top of this box, there is a large writing stated "Evidence Shoes". (Note: This evidence box is a used box of 34th District Court. This is why there are some other old marks on the box which are irrelevant to my case.) I wrote the case number, signed and dated on the box. Mr. Stelmach and Mr. Otis then also signed and dated on the box.

The recording is now completed. Mr. Otis then wrote and signed a receipt to acknowledge his receiving of the evidence box form Hon. Judge Battani. He then took the evidence box and left the court.

/s/________________________
Chi-Ming Chow, Appellee

Joseph H. Wagner, J.D.
Attorney at Law
432 West Michigan Avenue
Ypsilanti, MI 48197
313-485-6767

September 3, 1993

George E. Ward, Esq.
Chief Asst. Prosecutor for Wayne County
1441 St. Antoine
Suite 199
Detroit, MI 48226-2302

Dear Sir:

I am writing on behalf of my client, Chi-Ming Chow. The enclosed documentation chronicles a most unusual case of a citizens' attempt to defend himself against false accusations that I have ever encountered. My client wishes to meet with a representative of your office to discuss his desire to file a complaint.

I feel the evidence is substantial that he was falsely imprisoned and denied the civil rights guaranteed to all citizens under our State and Federal Constitutions.

He was handcuffed by a private security guard as well as arrested without a warrant by a Van Buren Township Police Officer for a misdemeanor which did not occur in his presence. Further his property as well as all other physical evidence was disposed of in violation of Court Order.

As a former student of yours at Detroit College of Law in 1973, I hope you feel free to contact me, or perhaps someone else from your staff so that we may arrange to let my client present any necessary documentation to allow your office to make a decision about his desire to file a complaint.

Sincerely,

/s/________________
Joseph H. Wagner
Attorney at Law

/mlc
Enclosures

Documents Relevant to the Proceedings

September 14, 1993 (Revised)

Chi-Ming Chow (Mr.)
2580 Holmes Road, No. 16
Ypsilanti, Michigan 48198

To Whom It May Concern:

My name is Chi-Ming Chow. I am a naturalized Chinese American citizen. I have retired from Oakland Community College since 1992 after serving more than 26 years as a charter mathematics faculty member.

I am writing this letter regarding Kmart and Van Buren Township attorney/prosecutor's false accusation, false arrest, defamation, malicious prosecution, conspiracy, perjury, wilful neglect of duty and malicious destruction of evidence to conceal crime and obstruct justice. The incident of this case occurred on August 12, 1989. After I won two appeals, the false charge of this case was finally dismissed on July 20, 1993. This case lasted for almost 4 years and cost me approximately $60,000 attorney fees. My life and reputation was ruined. All these unusual criminal acts can also happen to other people. This is why my attorney and I have decided to open this case to the public. It can be a useful reference and may offer some extra protection for all people of our community.

My case is actually a very simple case. The reason that it lasted for almost four years is because two conspiracies were involved. They were essentially confirmed and recorded on our court document.

The first conspiracy is that the real criminals abused our jury system. They used perjury and false evidence to mix with the true evidence to either confuse the jury or give the prejudiced jury a good excuse to convict an innocent Chinese American.

The second conspiracy is that after the first conspiracy was revealed in the appeals court, and the verdict was reversed and a new trial was ordered by the court, the real criminals defied court order and maliciously destroyed the true physical evidence to cover up and conceal their criminal act.

In order to let you understand my case better, it is necessary for me to make a brief statement of my case as follows:

To begin with, in 1989, I bought a plane ticket (flight ID 90832) for an European trip. The departure date for this flight was August 23, 1989. I decided to wear a pair of new shoes for this trip. In order to feel comfortable with my new shoes on this trip, I decided to wear them a few weeks earlier. I started to wear them on about August 7, 1989. (I always keep 5 or 6 pair of new shoes at home. In recent years, most of my shoes were bought from Kmart because of its reasonable price.) (Please see attached copy of Exhibit 1-1.)

On August 12, 1989 (Saturday), at about 9:15 p.m., I went to shopping at Kmart in Van Buren Township which was about 10 minute drive from my home. At about 9:30 p.m., I was at Kmart's footwear department. At that time, I heard a Kmart saleswoman saying the word , "teacher", in a disrespectful manner. I looked at her, but did not pay too much attention to her. I purchased two pair of new shoes because they fit me better . Those shoes were the last items I bought from Kmart on that day. I then walked to the checkout counter. After I paid for my merchandise, I was arrested by Kmart's security person, Fred Sweet, just outside of the Kmart's entrance door for not paying for my one-week shoes on my feet. (After this incident, I learned that this false accusation was made by Kmart's saleswoman, Jill Fehrenbach. I then checked with my school, Oakland Community College, and found out that she was a student at O.C.C. in 1986 and 1987 on the same campus where I taught. Later, at the trial, I also saw that Jill Fehrenbach was the same saleswoman who said the word, "teacher", when I was at the Kmart's footwear department on August 12, 1989.)

On the day of the incident, Fehrenbach apparently noticed that the shoes on my feet looked like new and thought she could frame me (I remember that she was never nearby me and had no chance to take a close look at the surface and bottom of my shoes.) So she called Fred Sweet, a Kmart security person, and made her false accusation. Sweet then arrested me outside of the door of Kmart about 15 minutes before the store was closed at 10:00 p.m.. After I was arrested, I immediately told Sweet that my shoes were one week old and also showed him the worn off signs on my shoes. He would not listen. I refused to sign any paper for my release. I told him to call the police. When two Van Buren Township policemen arrived, I again told them that my shoes were one week old and showed them the worn off signs, wrinkles , and dirt on my shoes. However, they arrested me again in spite of the condition of my shoes and my explanation. I was released after I paid my $100.00 bond in cash immediately after their request.

Right after the incident, Fehrenbach , Kmart's eye witness, wrote her incident report, a false accusation, as follows:

> I, Jill A. Fehrenbach witnessed Mr. Chiming

> Chow tried on a pair of work shoes sold in the Footwear Dept. Then he walked out of the Dept. with the new shoes still on his feet. He left his old shoes in dept. on the shelf where the shoes he took are located. Mr. Chow then walked toward the front checkout with the new shoes still on. (Please see attached copy of Exhibit 2-1.)

Sweet wrote in his report as follows:

> I first got the call from Footwear above subject came into the Footwear Dept. and tried on two pair of work boots then placed them his feet, then tried on a third pair and left them on his feet and proceed to walk out of store. Failing to pay for merchandise on his feet. Subject did pay for two other pair of boots and some sandwich bags. Subject was turned over to police authorities. (Please see attached copies of Exhibit 2-2 and 2-3.)

I believe that when Sweet was writing his incident report, he had not been involved in any conspiracy. This. was why he simply reported what he was told by Fehrenbach, what he saw and did in his incident report truthfully.

In this incident, Fehrenbach and Sweet were the accusers. They wrote their reports under no pressure whatsoever on the same day right after the incident of August 12, 1989 while their memories were fresh. The writing spaces of their reports were unlimited and they could write anything as they liked. By law, their signed incident reports to law enforcement office may also be under oaths. Therefore they must be responsible for their false accusation. It was fortunate for me that they wrote their reports separately immediately after the incident of August 12, 1989 before they had a chance to meet Van Buren Township attorney/prosecutor, Mr. Matthew G. Curtis. This was why although Jill Fehrenbach made her false accusation, Fred Sweet wrote his incident report truthfully.

Certainly, I know I am innocent in this incident. I told my attorney, Mr. Stelmach, to request Kmart to produce any motion pictures or video tape recording which might prove my innocence. Kmart produced none. I feared that Kmart and Van Buren Township could switch my one-week old shoes with a pair of new shoes. So on October 24, 1989, I voluntarily had my finger prints taken at Van Buren Police Department so that if they switched the shoes, they could not get my finger print on their new shoes. I also requested to identify my finger prints on Kmart's old shoes alleged by Kmart as the shoes I left on its shoe shelf. Later on 01-24-90, the State Police Laboratory reported in writing that they found no identifiable finger print of mine on Kmart's old shoes. (Please see attached copy of Exhibit 3.) Also on November 1, 1989, my attorney, Mr. Stelmach and I went to Van Buren Police Department and took pictures of my shoes and Kmart's shoes. (Please see attached two sets of photo copies.) These photos show that on my one-week old shoes, there were clear worn off signs on the heels. There are also wrinkles, mud, pieces of grass, and rain drop splashes on my one-week old shoes. It would be impossible for any one to change a pair of brand news shoes into the condition of my one-week old shoes by walking from the shoe shelf toward the front checkout on Kmart's polished floor as stated in Kmart Jill Fehrenbach's incident report. By all the facts, Kmart's false accusation was only based on its false witness reports. Kmart had no physical evidence to support their accusation. On the contrary, all the existing physical evidences have actually proved Kmart's false accusation of an innocent citizen.

After Prosecutor Matthew Curtis saw Kmart's two signed under oath reports, finger print test report, and the condition of my one-week old shoes, he knew it was a false accusation case. On November 21, 1989 at a pre-trial conference, Mr. Curtis told my attorney, Mr. Stelmach, and myself that the shoes (my one-week old shoes) looked bad and that he might consider dismissing the charge. This fact is confirmed by Mr. Stelmach's letter of July 24, 1992 to me. (Please see Exhibit 4.) Also before the trial, on May 1, 1990, Mr. Curtis called my attorneys, Mr. Stelmach and Mr. O'Keefe, and offered to dismiss the case if I would sign and waive all claims and civil liability against Van Buren Township and Kmart. Prosecutor Curtis admitted such dismissal offer on page 4 of the Transcript of his reply brief of June 12, 1991. (Please see attached copy of Exhibit 5.) Attorney O'Keefe's phone recorded message confirmed such unfair offer. Attorney Stelmach's letter of November 12, 1991 also confirmed such unfair offer. (Please see attached copy of Exhibit 6.)

I refused to accept this unfair and unjust offer as this incident has ruined my reputation and devastated my life. The real criminals who made false accusations to harm an innocent citizen should be punished by our law.

On May 4, 1990, Attorney O'Keefe and I went to Kmart. We found that the distance between the shoe shelf and the front checkout was approximate 75 steps which took about 1 minute to walk through. We then went to Van Buren Police Department and video taped the shoe evidences. (Attorney Stelmach did not go.) On the same day, I wrote a letter to Attorney O'Keefe and asked him to request the court to permit a live experimental demonstration in front of the jury at the scene of Kmart. (MCR 6.414, D allows such experiment.) We would ask some one to wear a pair of new shoes and walk from the shoe shelf toward the front checkout as stated in Kmart's incident report. We would then compare this pair of new shoes and my one-week old shoes worn on the day of the incident of August 12, 1989. (Please see attached copy of Exhibit 7.) On May 8, 1990, Attorney O'Keefe sent a letter with such request to the 34th District Court. (Please see attached copy of Exhibit 8.) This alive demonstration could immediately prove my innocence. Our country has the best scientific and technical laboratory knowledge for investigating physical evidence. However, the physical evidences of my one week old shoes such as worn off signs, wrinkles, soil dirt, dust , small piece of grass and rain drop splashes are so clear and obvious that any normal person can see the difference between my one week old shoe and a pair of brand new shoes by their naked eyes. Thus, my case is not a case of which side should one believe because no one can deny the facts as stated above. The prosecutor and Kmart also knew these facts. This was why they created the following conspiracy to harm an innocent man so that they could avoid being sued for damages:

1. Before the trial, the prosecutor let Fred Sweet fabricate a pair of so-called 15-minute old shoes and another pair of so-called one-week old shoes. These false evidences were later admitted as evidences at the trial. This fabricated testimony is false and irrelevant because it contradicts both Fehrenbach's and Sweet's signed reports of August 12, 1989 that I walked from the shoe shelf toward the front checkout with the new shoes still on. A 75 step walk takes only about 1 minute. These fabricated testimony and false evidence should not have been permitted at the trial in the first place.

2. Before the trial, Prosecutor Curtis stipulated with my trial counsel, Mr. O'Keefe, to allow their false evidence to be used in the trial without his objection. This fact is confirmed on Page 29 of the transcript of Sentencing and Motion of July 17, 1990. (Please see attached copy of Exhibits 9.) Also please see trial Exhibits 9-1 and 9-2. I was never informed of such stipulation and did not see the false evidence before the trial. Any one who has common sense knows that their false evidence was created to harm the innocent defendant. The prosecutor actually talked my counsel into accepting their conspiracy so that the false evidence could replace my request for a scientific experimental demonstration in front of the jury at the scene of the Kmart. My attorney not only failed to object the false evidence which was part of the conspiracy, but also collaborated with the prosecutor and Kmart's conspiracy without my knowledge.

3. In order to be sure that their conspiracy would work, before the trial, the prosecutor also asked Hon. Judge Zaborowski to tell my trial counsel that there would be no experimental demonstration at Kmart because it was too late to do so after the store was closed at 10 p.m.. Attorney O'Keefe mentioned this fact to me just before the trial. However, I believe this was very unfair since a person's innocence is more important than the timing of the experimental demonstration. We are fighting crime 24 hours a day. I also believe that the timing of the experiment should not be used as an excuse to allow unlawful false evidence to be used in a trial. Using unlawful false evidence to harm an innocent citizen to avoid being sued for damage is a conspiracy and a crime.

4. During the trial of May 18, 1990, Kmart's Fehrenbach and Sweet were actually lying under oath in the court. For

example, Fehrenbach testified that after I left the Footwear Department, she then called the security police. At the same time, Sweet testified that after he was called by Fehrenbach, he saw that I was still in the Footwear Department. Honesty is the best policy. When they made up a story, there would be some holes which could not be matched up with each other. Also in the court, they falsely testified that I scuffed my shoe heels for about 10 to 15 minutes up and down around the store. They even lied that Sweet, the security police, followed behind me and saw me scuffing the heels of my shoes around the store and passing through different departments. These false testimonies were recorded on page 52 , page 59 and Page 84 of the trial transcript. (Please see attached copies of Exhibits 10, 11 and 12.) They limited the scuffing heels time to 15 minutes because they knew they wrote on their original incident report of August 12, 1989 that the incident occurred at about 9:45 p.m. and I was falsely arrested before the store was closed at 10:00 p.m.. However, again, they should know that honesty is the best policy. They were too smart to lie and make such false testimonies in court because they apparently forgot that on their own two original signed incident reports of August 12, 1989, they wrote that I walked from the shoe shelf toward the front checkout and proceeded out of the store. Failing to pay the merchandise on my feet. (Please again refer to Exhibit 2-1 and 2-2.) I would like to point out again that their reports were written right after the incident with their fresh memories under no pressure whatsoever. They both were well educated and trained Kmart employees and should have the abilities to distinguish between a 1 minute direct walk from the shoe shelf toward the front checkout and a 15 minute scuffing heels around the store followed by their own security police who was also an eye-witness himself. A 1 minute and 75 step walk from the shoe shelf toward the front checkout and a 15 minutes and thousands scuffing heels around the store are two completely different measures of times and descriptions of scenes. They simply can not replace each other. If any conscientious person still has doubt, we may even get 3 to 10 police officers not involved in my case and set up an experiment. We shall ask them to follow behind a person who scuffs his shoe heels around a store from department to department for 15 minutes and then proceeds out of the store. We shall then ask them to write their eye-witness incident reports. I can be sure that their reports will show that both Fehrenbach and Sweet were lying under oath in court. Further more, had Fehrenbach and Sweet actually seen I scuffed heels of my shoes around the store followed by Sweet for 15 minutes, they would have certainly written it down on their eye-witness incident reports of August 12, 1989 so that they could convict the criminal and avoid being sued for perjury and damages later. It was after they got together with Prosecutor Curtis and saw the condition of my one-week old shoes, they changed their original eye-witness statements and lied under oath to harm an innocent citizen. This is conspiracy and perjury. This fact has been recorded on the Exhibits of court document as I have stated before. They should be charged and punished for conspiracy and perjury by our law. It is clear that their perjury was an attempt to prevent civil liability.

5. During the trial, my trial counsel and the prosecutor never pointed out the fact that State Police Laboratory found no finger print of mine on the Kmart's old shoes claimed by Kmart as my old shoes left in Kmart. Thus the prosecutor did not present all the evidence as required by law.

6. When I saw Kmart's fabricated false shoe evidence in the trial, I reminded my trial counsel, Mr. O'Keefe, about my request for an experimental demonstration in front of the jury.

He told me to shut up. As you know, at a trial, a defendant depends on his own counsel to defend him. So I did not talk back. This fact was confirmed in my letter of August 2, 1990 to Mr. O'Keefe and his reply letter of August 6, 1990 to me. (Please see attached copies of Exhibit 13 and Exhibit 14) After his innocent client was unjustly convicted, Mr. O'Keefe was smiling as if he won the case. From these facts and exhibits mentioned before, it is clear that my trial counsel actually collaborated with the prosecutor to carry out their conspiracy and allow them to use false evidence and perjury in the trial without his objection.

Conspiracy means that two or more persons make a plan to commit an unlawful act. The prosecutor and Kmart planned before the trial to use their false evidence to replace my scientific experimental demonstration in front of jury so that they could avoid being sued for damages. Their planned unlawful act is clearly an undeniable conspiracy to obstruct justice.

The result of their conspiracy was that during the trial, there were 6 pair of shoes on the table which was located in the center of the court room. (One pair of Kmart's old shoes, one pair of my one-week old shoes, one pair of my new shoes purchased on August 12, 1989, two pair of Kmart's false evidence shoes, and one pair of Attorney Stelmach's new shoes added by Attorney O'Keefe.) (Please see attached copies of photos.) The true physical evidences and false exhibits were all mixed up together without my trial counsel's objection. The jury sat far away from the shoe table. Jury members never took a close look at each pair of those 6 pair of shoes during the trial. My trial counsel knowingly failed to point out the difference between my one-week old shoes and brand new shoes to the jury. When the jury deliberated, they took those 6 pair of shoes with them into the jury room. Among the 6 pair of shoes, 5 pairs are of the same brand and look alike. (Please see attached photo copies.) I asked Prosecutor Curtis that how could the jury know the character of each of those shoes. He told me that if they had question, they would ask. The jury members (5 European Americans and one African American) were laughing all the time in the jury room as if they had a good time. It is clear that Kmart's false testimonies and false evidences either confused the jury or gave the prejudiced jury a good excuse to convict an innocent Chinese American who has never violated the law. I was falsely and unjustly convicted by this jury in about one half hour.

On the sentencing day, July 17, 1990, I told the Judge bluntly that Kmart made false accusation and used false evidence to replace my request for a live demonstration in front of the jury. That was how Prosecutor Curtis revealed that before the trial, he stipulated with my trial counsel to allow the false evidence to be used in trial without my trial counsel's objection. (A conspiracy.) (Please again refer to Exhibit 9.) When I told the Judge that I wanted to appeal. Judge said that he had to fine me first so that I could appeal. Because of my appeal, he then changed to pay $150.00 bond. I paid $150.00 bond in cash right after the sentencing.

8. Attorney Sylvia Delin represented me for my appeal. She brought all the physical evidences to the Wayne County Circuit Appeals Court and simply pointed out that Kmart's false evidence contradicted with their own two original signed incident reports of August 12 1989, and that the prosecutor stipulated with the defendant's counsel before the trial to allow Kmart's false evidence to be used in the trial without the counsel's objection. She also pointed out that the unfair

conviction was prejudiced. On February 1, 1991, after reviewing all the physical evidences and arguments, Hon. Judge Marianne O. Battani reversed the unjust conviction and ordered a new trial for my case because I did not have a fair trial due to ineffective assistance of counsel. Her Honor's judgment of ineffective assistance of counsel was based on her Honor's observation on the physical evidence.

Hon. Judge Battani made the following comments regarding the physical evidence in my appeal transcript of February 1, 1991:

1). Kmart self-made evidence used in the trial contradicts with their own reports written before the trial. Contrary statements made by the prime witnesses against the defendant appeared to contradict the testimony at trial.

2). There are clear obvious worn off signs and dirt from outside of the store on Defendant's shoes. The burden of the contrary statement is beyond a reasonable doubt. (My comment: This means that the verdict was not beyond a reasonable doubt.)

3). It was absurd that the defendant's counsel allowed Kmart to use its contradictory evidence in the trial without his objection.

It is clear that Hon. Judge Battani's order for a new trial was actually based on her Honor's viewing of the physical evidence. Her statement and comments were recorded on Pages 21, 22 and 23 of the transcript of my appeal dated February 1, 1991. (Please see attached copies of Exhibits 15-1, 15-2 and 15-3.)

I would also like to mention that in my appeal, we pointed out ineffective assistance of counsel and verdict against the great weight of evidence. Hon. Judge Battani commented: ". . . I don't find the verdict against the great weight of the evidence, if that be a standard, which I'm not sure in criminal cases it is a standard, but I don't think it makes any difference because I find ineffective assistance of counsel." (Please see Exhibit 15-2 and 15-3.) This statement shows that Her Honor does not even try to find the great weight of evidence because her Honor is so sure that ineffective assistance of counsel alone is sufficient to order for a new trial. Her Honor never states that there is no great weight of evidence.

In her Honor's order of February 22, 1991 for a new trial, her Honor also pointed out Kmart's inadmissible contradictory evidence. (Please see attached copies of Exhibits 16-1 and 16-2.)

On April 19, 1991, with Hon. Judge Battani's permission, in her Honor's jury room attended by Van Buren prosecution official, Mr. Otis, my attorney, Mr. Stelmach, I video tape recorded all the physical evidence used in my case. After the recording, all the physical evidences were sealed in an evidence box by me. This box was then dated and signed by Van Buren Township's prosecution official, Mr. Toth, my attorney, Mr. Stelmach and myself. Mr. Otis then signed a receipt to acknowledge his receiving of the evidence box from Hon. Judge Battani. (Please see attached Exhibit 17.) Mr. Otis was ordered by Hon. Judge Battani to take the evidence box back to Van Buren Police Department and keep it for the new trial.

Prosecutor Curtis obviously knew that he could not use his well known conspiracy again in a new trial. So he tried to get some racially motivated unfair sympathy from my attorneys. The fact is that three of my previous attorneys, Mr. Stelmach, Ms. Delin and Mr. Mullkoff, all told me that Mr. Curtis had told them that he was going to be out of my case. The result was that Mr. Curtis filed his frivolous application for leave to appeal at Michigan Court Of Appeals in March of 1991 without my attorney's response brief. This application for leave to appeal was granted by the court on May 24, 1991. My attorney knowingly missed the limited responding date to stop the prosecutor's appeal even after my repeated inquiries. Justice was clearly obstructed and delayed by the prosecutor's frivolous appeal.

My attorney, Mr. Ziem, then filed an Amended Supplemental Brief on December 20, 1991 in response to the prosecutor's frivolous appeal.

On March 31, 1992, the State Court of Appeals ordered to compel prosecutor to produce exhibit. (Please see attached Exhibit 18.)

On May 1, 1992, my attorney, Mr. Ziem, represented me and filed a complaint at Wayne County Prosecutors Office regarding Kmart and Van Buren Prosecutor's malicious false accusation, false arrest, malicious prosecution, conspiracy and perjury. Wayne County Deputy Chief Prosecutor, Mr. Howard L. Philippart, then made an appointment for us to view and examine our physical evidences at Van Buren Police Department on September 28, 1992. On September 15, 1992, Attorney Ziem called me and stated that Deputy Chief Prosecutor Philippart informed him that Van Buren Police Department had lost the evidence box containing all of our physical evidences. Mr. Philippart made his affidavit regarding this new development on September 29, 1992.

(Please see attached Exhibits 19-1 and 19-2.)

From the beginning, I told my attorneys that my one-week old shoes were my witnesses and the best evidence to prove my innocence. After the incident of August 12, 1989, my one-week old shoes (witnesses) were held in the real criminal's hand. I have long anticipated that they could be destroyed by the criminals any time. This is why I have tried my best to protect them from being harmed by taking their pictures and video recording them. Now my worry about a disastrous ending has become real. The criminals finally maliciously and deliberately destroyed my best witnesses to prove my innocence.

Fortunately, my witnesses can not be silenced. Their physical appearances can speak for themselves. The following two sets of photo copies and three sound video tapes presently exist:

1. On November 1, 1989, my attorney , Mr. Stelmach, and I went to Van Buren Police Department and took pictures of my shoe evidences. (Please again see attached two sets of photo copies.)

2. Before the trial of May 18, 1990, my attorney, Mr. O'Keefe, and I went to Van Buren Township Police Department on May 4, 1990 and video recorded my one-week old shoes and Kmart's old shoes. A police officer was also at the scene of taping.

3. After the trial of May 18, 1990, my attorney, Ms. Dagher-Margosian, and I went to 34th District Court on July 3, 1990 and video recorded all the evidences including Kmart's old shoes (People's Court Exhibit 1), my one-week old shoes (People's Court Exhibit 2), Stelmach's new shoes

(People's Court Exhibit 3), Kmart's original incident report (People's Court Exhibit 14), Kmart's Two pair of fabricated shoes (People's Court Exhibits 15 and 17) and my new shoes with attached purchase receipt of August 12, 1989, the date of the incident. (People's Court Exhibit 16).

4. After my appeal hearing of February 1, 1991, my attorney, Mr. Stelmach, and I went to Hon. Judge Battani's Court on April 19, 1991 and again video recorded all the evidences, as stated above, with the presence of Van Buren Prosecution official Otis. After the recording, all the 7 exhibits were sealed in a 2 ft by 1.5 ft by 1 ft (approximate) evidence box and signed by Mr. Stelmach, Mr. Otis and myself. Mr. Otis then wrote and signed a receipt of the evidence box for Hon. Judge Battani. (Please again see attached Exhibit 17.) That was the last time I saw my one-week old shoes. I do not know what has really happened to the evidence box after Mr. Otis took it away from Hon. Judge Battani's court room.

On October 13, 1992, Van Buren Police Director, Mr. Mark Perkins, sent a letter to Prosecutor Curtis and stated that the evidence box of this case was improperly disposed and auctioned on August 29, 1992 (One month before Deputy Prosecutor's request to review the evidence.) by Ms. Jean Johnson, a civilian clerk. (On September 14, 1993, Ypsilanti Press showed a picture of Jean Johnson, a middle aged police officer. Picture is shown in Exhibit 19-5.) Ms. Johnson also made a statement dated 09/29/92 regarding the auction of the evidence of VBPD Case# 41-035-89. (Please see attached Exhibits 19-3, 19-4 and 19.5.) (Please also note: My case number in 34th District Court is C894032, in Wayne County Circuit Appeals Court is 90-019210-AR and in Michigan Court Of appeals is 138761.) Based on their statements, we have the following facts:

1. It is unbelievable that VBPD Director could give approval to auction an evidence box based only on Ms. Johnson's so-call gentleman message which had no name, no date or recording. (It is known that police phone calls usually are recorded.) Also it may be a perjury if VBPD Director knowingly tells the court that Ms. Johnson is a civilian clerk when she is actually a police officer.

2. Prosecution Official Otis was ordered by Hon. Judge Battani to deliver the evidence box to VBPD on April 19, 1991. This date was after Ms. Johnson received her so-called gentleman's phone call. If he indeed delivered the evidence box to VBPD, he had the duty to tell BVPD that this case was not over and evidence box should be kept for future new trial use. He would certainly inform VBPD that the evidence box was sealed and signed by 3 eye-witnesses. It should not be opened without the presences of the three eye-witnesses, to prevent any tampering of the evidence.

3. VBPD has the duty to train its employees how to guard and handle the evidence box. It is also known that each evidence box or bag in the evidence locker room is well marked and tagged. (Please notice that there is marked tag on each evidence bag as shown in my photo copies.)

4. Michigan Court Of Appeals ordered the prosecutor to produce the evidence on March 31, 1992. This order was 5 month ahead of the VBPD's auction in August of 1992. The prosecutor had the duty to inform VBPD and would make sure to let VBPD be aware of the court order to produce the evidence.

5. It is known that there are certain procedures to auction. VBPD should return the properties to the known owners before it carried out its auction. However, VBPD did not do so.

Based on all the above-mentioned facts, it would be illogical and unbelievable that VBPD could auction a well known, marked, sealed and signed big 2' x 1.5 'x 1' evidence box to some one without a confirmed court order. Their so-called auction based only on an unconfirmed phone message is simply an alibi. It is clear that they used Ms. Johnson as their scapegoat. The Van Buren prosecutor and VBPD knew that they could not use their well known old conspiracy again in Michigan Court Of Appeal or in a new trial. This was why they deliberately defied the court orders, wilfully neglected their duties and maliciously destroyed the physical evidence to cover up their criminal act. This is a new conspiracy.

On February 17, 1993, the hearing for the prosecutor's appeal was held in Michigan court Of Appeals by three Hon. Judges, Maura D. Corriage, John H. Shepherd, and Gary R. McDonald. On June 1, 1993, three Honorable Judges issued their unanimous decision to deny the prosecutor's appeal and remand this case back to 34th District Court with the following statement: (Please see attached Exhibits 20-1, 20-2 and 20-3.)

1. Ineffective assistance of counsel. We agree with the court below that counsel's decision to forgo objection (inadmissible evidence) was a significant omission which prejudiced defendant.

2. Defense counsel also failed to pursue issues relating to the weight of the evidence. This omission also deprived

defendant of a fair trial.

3. Defendant counsel failed to cross-examine about the test condition of the evidence.

4. Defense counsel also completely failed to attempt to impeach the store security guard with an incident report he had prepared. The guard testified at trial that he had seen defendant scuffing the heels of the stolen shoes while he walked around the store. However, he omitted any mention of this unusual behavior in his contemporaneously filed incident report.

5. Defense counsel also failed to pursue the store clerk's acknowledgment that she attended Oakland Community College. Defendant served on the faculty of that institute. Defense counsel thus neglected the issue of possible witness bias in a case where credibility was crucial. Counsel's failure to explore credibility was also significantly prejudicial.

(Please notice that this court decision was originally printed on pink paper with a cover letter which states: Under MCR 7.215 (A), Opinions not designated for publication at the time of release are printed on pink paper. (Please see Exhibit 20-0.) At the end of page 2, it states:

> The issues relating to alleged prosecutorial misconduct raised in defendant's supplemental brief were not argued before the court below and thus are not properly before us.

Indeed, when this case was in lower court, Wayne County Appeals Court, all physical evidences still existed, and the unlawful auction and conspiracy to cover up the crime had not occurred yet. Therefore, it is not proper for this higher court to make comment on these issues. In order to avoid a precedent in a publication, this court paper was unpublished and it omitted the conspiracy and destruction of evidence without explanation.)

On July 20, 1993, Attorney Joseph H. Wagner represented me at the new pre-trial. Hon. Judge Zaborowski dismissed the charge of this case without a trial for lack of evidence. (Please see attached Exhibit 21.) His Honor also answered my inquiry that His Honor gave no restriction for me to file civil or criminal law suit.

Two sets of photo copies are attached to this letter. These photo copies are also on files of the Van Buren Township Prosecution Office, 34th District Court, Wayne County Circuit Appeals Court and the Michigan Court Of Appeals before the physical evidence being maliciously destroyed. Two set of video tapes have been verified and kept by the prosecutor and Michigan Court Of Appeals. They are available for your review. Please notice that in the video tape, People's Court Exhibit 2 are my one-week old shoes. This exhibit number was recorded on Page 52 of the trial transcript of May 18, 1990. (Please see Exhibit 10.)

In conclusion, our National Constitution assures equal justice and equal protection of the laws for all citizens born or naturalized in the United States. Kmart and Van Buren Township prosecutor's false accusation, false arrest, perjury, and conspiracies, etc. violated my constitutional right and ruined my reputation and life. People usually believe that the duty of a prosecutor is to fight the crime and protect the innocent. In my case, Van Buren Township prosecutor did just the opposite. He was helping the real criminal to harm an innocent citizen so that they could avoid being punished for damage. Therefore, they did all their wrong doings knowingly and not by mistake. In my case, Kmart saleswoman, Jill Fehrenbach and Prosecutor Curtis totally disregard our law. They are the chief offenders. A lot of other people were also involved in criminal act because of their wrong doings. Now the charge of my case has finally been dismissed after 4 long years. Our justice really works if you do not give up hope and the confidence in our National Constitution. Furthermore, had I worn my new shoes for the first time on August 12, 1989 and gone to shopping at Kmart and then been falsely accused by Kmart, it would have been very difficult for me to prove my innocence. I am extremely scared and upset whenever I think about this. This similar situation can also happen to other people. This is why my attorney and I think that we should open our case to the public to warn or caution all people about this potentially dangerous situation in our daily life. We should request that all stores must have absolute proof such as video tape recording to support their accusation. This requirement will certainly give all customers some extra protection. I sincerely hope that our law will teach Kmart and other stores a good lesson that honesty is the best policy. Harming an innocent citizen can be harmful to yourself.

Thank you for reviewing this letter.

Very truly yours,

/s/____________________
Chi-Ming Chow

Documents Relevant to the Proceedings

EXHIBITS

Documents Relevant to the Proceedings

Exhibit 1

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RETAIN FOR REFUND

OUR K-MART NOW ACCEPTING
APPLICATIONS FOR EMPLOYMENT

1 417045468193 FOOTWEAR        17.83
2 417045468043 FOOTWEAR        17.83
3 014418300447 PADLOCK          2.17
4 072629747079 FOOD BAGS        1.47
5 072629667070 SANDWICH BAG     1.68
6 072629667070 SANDWICH BAG     1.66
           SUBTOTAL            42.66
           TAX                  1.71
           TOTAL               44.37
           CASH TENDERED       50.00
           CHANGE               5.63

9932-9932 014 07 8/12/87  3155   9:28P.
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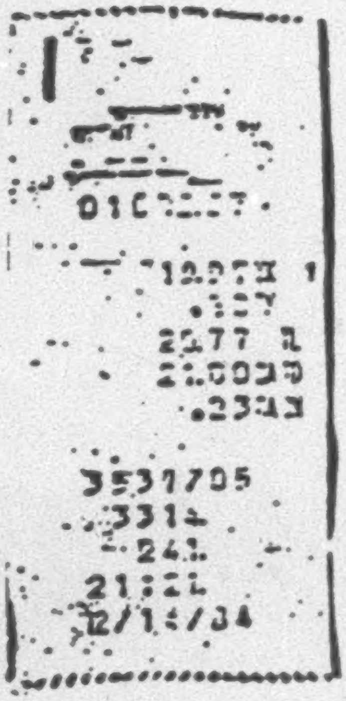

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     Kmart
RETAIL OR REFUND
REG.SER.NO.

0100267#

  19.97 TX   1
    .80 TX
  20.77   TL
  21.00 CA TD
    .23 CACH

3537/05
3314.
 241
21:21
12/14/84
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1 0440310        CRACKERS       1.77 E
2 03400-0175006  GIANT BAR      1.59 E
3 034000104055   BAR NONE 6PK   1.97 E
4 075186056387   CANDY.....     1.56 E
5 418070468379   FOOTWEAR      22.97
            SUBTOTAL           29.80
            TAX                  .92
            TOTAL              30.72
            CASH TENDERED      40.00
            CHANGE              9.28

4445-4445 002 26  5/30/85 3207   3:33P
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Exhibit 1

Documents Relevant to the Proceedings

Exhibit 2-1

K mart CORPORATION
Loss Prevention Department

SPECIFIC OFFENSE: RETAIL FRAUD 2ND DEGREE

CASE:

STATEMENT FORM

STATEMENT OF: JILL FEHRENBACK	ADDRESS: 2095 RAWSONVILLE Belleville MI	PHONE: 485-8510	AGE AND DOB: 21-01-17-6
CONNECTION W/CASE: WITNESS	WHERE TAKEN: SHOE DEPT.	DATE AND TIME: 8-13-89. 1:00 PM	

I Jill A. Fehrenbach witnessed Mr. Chiming Chow Try on a pair of workshoes sold in The Footwear Dept. Then he walked out of The Dept. with the new shoes still on his feet. He left his old shoes in dept on the shelf where the shoes he took are located. Mr Chow Then walked toward the front checkout with the new shoes still on.

CASE OF CHOW, CHI MING

WITNESS:

The above statement is the truth to the best of my knowledge. I have made the above statement of my own free will and accord without any promise of immunity or reward and without any force or duress.

SIGNED: Jill A Fehrenb
ADDRESS: 8823 Green Rd #6
CITY: Ypsilanti ZIP: 48198
DATE: 8-12-89 TIME: 10:00

CODE 94-48-43—Pads-30—(Rev. 1/84)—K—Litho in U.S.A.

Exhibit 2-1

Exhibit 2-2

FRED SWEE.
372-74-226.
H-484-3697
W-485-8510

Kmart Corporation

Loss Prevention Department
Report of Apprehension

Store Number: 3

Print in Ink or Type

Place of Apprehension (Exact Location): OUTSIDE vestibule
Date: 8-12-8[illegible]
Day of Week: SATURDAY
Time: 10:00 ☐ ☐

Subject's Last Name: CHOW
First Name: CHI MING
Middle Initial:
Telephone No.: 484-02

Street Address: 41850 CAROUSEL DR P.O. BOX 903
Date of Birth: 11-15-31
Marital Status: SINGLE

General Description (Physical Characteristics - If Juvenile, Give School Attending)
Amt. of Money on Subject: $
Subject's Initial

Description of Merchandise Recovered	Number	Retail Value
1 PAIR WORKBOOTS	1	$22.97

Total Value of Merchandise Recovered ▶ $ 22.97

Off Cases or File Checked for Previous Apprehension ☐ Yes ☐ No

Place Subject First Observed (Exact Location): FOOTWEAR
Time: 9:45 ☐ AM ☒ PM
By Whom (Name & Title): FRED SWEET L.P.M

Subject Apprehended By (Name & Title): FRED SWEET L.P.M
Incident Witnessed By: (Associate Copy): Jill A. Fehrenbac

Subject Interviewed By (Name & Title): FRED SWEET L.P.M
Place (Exact Location): L.P. OFFICE
Interview of Subject Witnessed By: Jill A. Fehrenba

Did Subject Sign - General Release Form ☐ YES ☐ NO
Other Written Admission? ☐ YES ☐ N

Describe Incident in Detail (Use Reverse Side if Necessary): I First got the call from Footwear
Above Subject CAME into THE FOOTWEAR DEPT And
TRIED ON TWO PAIR of WORK BOOTS THEN PLACED THEM
his FEET THEN TRIED ON A THIRD PAIR AND LEFT THEM ON HIS
FEET And PROCEEDED TO WALK out of STORE FAILING
TO PAY FOR MERCHANDISE ON HIS FEET. Subject Did pay For

I have read and understand the above and to the best of my knowledge it is true in every respect.

Signature of Person Apprehended

Action Taken
Name(s) of Parent(s) or Name(s) and Title of Officer(s)
Time released

☐ Released To Parents
☒ Turned Over To Police Authority
☐ Released – Not Arrested
☐ Turned Over To Juvenile Authority

Final Disposition of Mdse. Recovered
Department Returned To:
Name of Recipient
Date

Date Report Prepared
Signature
Title

If Subject Is Prosecuted, Complete This Section When Case Disposition Becomes Final

Arraignment Date
Time ☐ AM ☐ PM
Trial Date
Time ☐ AM ☐ PM
Subject's Plea ☐ Guilty ☐ Not Guilt

Case Disposition ☐ Dismissed ☐ Acquitted ☐ Convicted ☐ Other ______

Penalty ☐ Fine $ ______ ☐ Other ______

Exhibit 2-2

Correspondence Relevant to the Proceedings

(HANDWRITTEN NOTE)

TWO OTHER PAIR OF BOOTS AND SOME SANDWITCH BAGS SUBJECT WAS TURNED OVER TO POLICE AUTHORITY

(Exhibit 2-3)

STATE OF MICHIGAN
JAMES J. BLANCHARD, GOVERNOR
DEPARTMENT OF STATE POLICE
714 SOUTH HARRISON ROAD
EAST LANSING, MICHIGAN 48823
COL R. T. DAVIS, DIRECTOR

FORENSIC SCIENCE DIVISION
NORTHVILLE LABORATORY
42145 WEST SEVEN MILE ROAD
NORTHVILLE, MICHIGAN 48167
PHONE: (313) 473-1000

Laboratory No.: 14276-89
Record No. : 13010
Received By : Mary E. Dempsey
Date Received : 11-07-89

Nature of Offense: Larceny

Victim: K-MART

Suspect: CHI MING CHOW, W/M. 11/15/31 (FP)

Evidence Received:

One K-Mart bag containing
1 - Pair of worn black shoes

Processing Results:

The evidence submitted was processed for latent prints with no identifiable prints being obtained.

Remarks:

The submitted inked impressions will be returned to the investigating agency.

/s/______________________
Mary E. Dempsey
Specialist (Sgt.)

MED:tb
1/25/90
84

(Exhibit 3)

LAW OFFICES
STEVEN STELMACH, JR.
PROFESSIONAL CORPORATION
2970 EAST BIG BEAVER ROAD
TROY, MICHIGAN 48083

July 24, 1992

Professor Chi-Ming Chow
2580 Holmes
#16
Ypsilanti, MI 48198

Re: People of Van Buren Township vs. Chow

Dear Professor Chow:

Pursuant to your request during our telephone conversation on July 24. 1992, and after having you refresh my recollection to some degree, I believe I can state that on November 21, 1989 at a pre-trial conference in the above referenced matter, I had a talk with the City Attorney who had apparently seen the alleged stolen shoes which were the subject of the case and he commented that the shoes looked bad and that he might consider dismissing the charges but would not do so at that time, presumably because he had to investigate the matter further.

That is my recollection to the best of my ability, however, please keep in mind that I had just come in from Court when you called me on the phone and asked me to recall what occurred almost three years ago and I have not had an opportunity to dig into your enormous file to try to verify the information you gave me to refresh my recollection.

I have not spoken with you in some time despite my requests that you keep me informed of everything that is happening. You have still not told me who your appellate attorney is and I believe I might be helpful to him, however, you have indicated that you do not want him to discuss anything with me because he is young and unstable and it might change his mind about the apparent approach he is currently taking. That is what I understood you to say when you called me back on July 24, 1992 for the second time while I was dictating this letter.

In any event, if this letter does not suit your needs, please have your attorney contact me to indicate what other format he may wish it to be presented.

/s/______________________
Steven Stelmach, Jr.

(Exhibit 4)

* * *

evidence.

10. Trial counsel's stipulation to allow other pairs of shoes into evidence as exhibits was a strategic decision on the part of trial counsel who believed that the other exhibits would demonstrate to the jury that the subject pair of shoes defendant was wearing when he attempted to leave K-Mart were old shoes rather than new shoes. Plaintiff-Appellant submits that this deliberate choice of trial strategy does not prove that defense counsel was incompetent, simply because the trial strategy was unsuccessful. It is on this point that plaintiff-appellant has appealed Judge Battani's ruling.

11. The prosecuting attorney's offer to drop charges occurred before trial and was not motivated by concern that defendant was "wrongfully accused" of stealing shoes but was an attempt to avoid costly litigation over an incident involving a twenty-five dollar pair of shoes. Such settlement offers are totally irrelevant and plaintiff-appellant strongly protests the violation of public policy by defendant-appellee in bringing this settlement offer to the attention of this Court. The fact remains that defendant rejected the Township's reasonable offer to avoid prosecution and took his chances with a jury trial where he was found guilty based upon the eyewitness testimony of two witnesses.

12. Defendant clearly could have avoided the risk of being found guilty by a jury of shoplifting had defendant accepted the prosecutor's generous conditional offer to drop charges, and thus have avoided disrupting the "peace and equilibrium of his life."

[4]

(Exhibit 5)

Professor Chi-Ming Chow
2580 Holmes Road
#16
Ypsilanti, MI 48198

Re: People vs. Chow

Dear Professor:

Pursuant to your request in your letter of November 8, 1991, please be advised that I do remember having the conversation with Mr. Curtis wherein he offered to dismiss the case if releases were signed waiving any and all claims against Van Buren Township and Kmart to the best of my recollection.

As you know, at that time, I had already been advised that attorney O'Keefe was involved and so I told Mr. Curtis that I could not entertain his offer because I was no longer representing you. I believe Mr. O'Keefe also knew of the offer of Mr. Curtis.

Also, I remember discussing the matter with you as well and you, of course, rejected the idea.

Please contact me upon receipt of this letter.

Very truly yours,

/s/____________________
Steven Stelmach, Jr.

SS/11

(Exhibit 6)

May 4, 1990

Mr. Kurt O'Keefe, Attorney
2950 David Stott building
1150 Griswold
Detroit, Michigan 48226

Dear Mr. O'Keefe:

It seemed that your were always busy or in a hurry when I was talking to you. So I decide to write this letter.

First, I would like to inform you that today's video tape recording is good and useful. Now our evidences are solid and confirmed. The chance for the other side to switch the evidence has been minimized.

I know you are a good attorney. I hope you are also a humble person. If I say something which is useful for our case, I hope you would consider it.

As I have suggested before, maybe our next best thing to do is to get a court order and request Jill, Kmart's eye-witness, to demonstrate personally about her false accusation. That is to let her wear a pair of new shoes of the same brand as my old shoes, then walk from Kmart's shoe shelf toward the front check-out in any manner or way. We shall video tape record her walk and count the time and distance of her walk. We shall then compare the conditions of her shoes and my old shoes. There will be no way for her to-get all the worn-off signs, dirt, soil, grass, scratches, wrinkles, dust, rain drop or water splash traces, etc. on the surface, side, sole and heel of her shoes as of my old shoes. This request of her demonstration is a must. Sooner or later we will have to make this request because only fact can stop their argument. Also it is better to get this result before the jury trial. Otherwise, we will have to stop in the middle of the trial to get this result. That will be an ineffective way to do and will only waste the court's time and people's money. The prosecutor should also know this. Thus, if it is necessary, we may have to delay the trial date in order to get this demonstration and result. Further more, the prosecutor may drop the case for lack of evidence after we get all the facts for this case.

This letter can be used as a reference for the prosecutor.

Your comment and consideration will be appreciated.

The trial date, May 18, 1990, is very close. Your prompt answer will also be appreciated.

Very truly yours,

/s/____________________
Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, Michigan 48198

(Exhibit 7)

WOODS AND O'KEEFE
ATTORNEYS &COUNSELORS AT LAW
2950 DAVID STOTT BUILDING
DETROIT, MICHIGAN 46226

May 8, 1990

34th District Court
Judge Szlinis
11131 Wayne Road
Romulus, MI 48174

Re: People vs Chow C 89 0432

Defendant proposes the following jury instructions:

All of Chapter 1, 2.1 through 2.13, inclusive, 2.16, 2.17, 2.22, 2.24, 2.25 and 2.26.

3.1, 3.2, Defendant reserves the right to submit a theory of the case instruction in conformance to the evidence presented at trial, 3.5, 3.6, 3.9, 3.11, 3.14, 3.15, and 3.17. Defendant reserves the right to ask for 3.3 if he does not testify on his own behalf.

4.7, Defendant is asking the prosecution to stipulate that a pair of new shoes, purchased by Defendant's prior attorney, be admitted into evidence as being new shoes from the same K-Mart store, in order to avoid having to call Mr. Stelmach as a witness, 4.8, 5.2, 5.11, and Defendant reserves the right to ask for 5.12 if the evidence at trial makes it appropriate, and 23.1.01.

Defendant serves notice that he will object to testimony by any prosecution witness whose prior statement has not been furnished to him pursuant to this Court's discovery order. Defendant will ask the Court to allow the jury to view the scene at K-Mart, to show the impossibility of scuffing the heels of the shoes on the floor.

Sincerely yours,

/s/______________
Kurt O'Keefe

P.S. to Mr. Chow: I would like you to compile a list of all of your students of the fall 86 and winter 87 terms, so I can ask the prosecution witness if she knew any of them.

(Exhibit 8)

* * *

what happened was, there was a pair of shoes worn by the security officer, in which he went by scuffing his heels --

MR. CHOW: Yeah, and no one saw it --

MR. CURTIS: -- down the hallways. I presented and offered that into proof to indicate that he substantially -- he -- he imitated Mr. Chow, and went through the same halls. Defense attorney for Mr. Chow, the trial counsel, agreed to allow those shoes to be admitted into evidence, because in my conversations with him, he thought that those also helped his case, because he could show things on that shoe that showed that they were different than Mr. Chow's --

MR. CHOW: But nobody saw --

MR. CURTIS: - - so he stipulated to that - - to that exhibit, so he can't now come back and say, oh gee, that should have been - - shouldn't have been admitted, because it was a stipulated exhibit by - - by his own counsel.

MR. CHOW: That's against the weight of evidence. Because getting shoe in front of the jury, he made his own false evidence, and fooled the jury. The jury didn't see it. This was - - this - - means - - justice for - - for the innocent people. Now we let prosecutor use false evidence, false accusation to harm an innocent citizen, that's really injustice. I just say, if you want to admit any evidence, you must have scientific proof. But he - - he won't ask, how long did you wear. His opinions, but nobody

(p. 29 of Sentencing Motion of 7-17-90)
(Exhibit 9)

A. I then brought the bag to the police department the next - - the following day, which is this morning.

Q You then - - did that bag, and the shoes contained in the bag, stay in your possession?

A Yes, they did.

Q. And what did you then do once they were left at the police department, or once you brought them there, you kept them in your possession, what did you then do?

A I then brought those - - those shoes to the court house.

Q And that would be this morning?

A This morning, yes.

MR. CURTIS: Your Honor, I'd move to admit People's Exhibit Number Fifteen into evidence.

MR. O'KEEFE: No objection.

THE COURT: May be admitted into evidence.

(At 10:50 a.m. PX#15 admitted into evidence)

BY MR. CURTIS:

Q Taking a look, Mr. Sweet, as what's been marked in People's Exhibit Number Fifteen, do you note any wear on the heels?

A Yes, I do--

MR. O'KEEFE: Objection - -

MR. CURTIS: Thank you - -

MR. O'KEEFE: --again, the Exhibit speaks for itself, your Honor, the jury can certainly--

THE COURT: Sustained.

[p. -90- Trial of 5-18-90]

(Exhibit 9 - 1)

A. I was working both jobs, the wear and tear on the shoes was just from - - from all types of surfaces, common surfaces, anywhere from carpet to pavement.

Q. Okay. After you wore those shoes for seven days, what did you then do with them?

A. I then placed those in a - - in a bag and did not wear them - - them shoes anymore, they were kept off my feet.

Q. Okay. Were these shoes kept in your possession until court today?

A. That's correct.

MR. CURTIS: Your Honor, I would move to admit People's Exhibit Number Seventeen into evidence.

MR. O'KEEFE: No objection, your Honor.

THE COURT: May be admitted into evidence.

(At 11:46 a.m. PX#17 admitted into evidence)

MR. CURTIS: People rest, your Honor.

THE COURT: All right. Ready for arguments? Go ahead, you ready to go to arguments, we'll go right now.

MR. CURTIS: People are ready.

THE COURT: All right. You may step down.

(At 11:47 a.m. witness excused)

THE COURT: The Prosecution may proceed with arguments to the jury.

MR. CURTIS: Ladies and gentlemen this is now my

[p. -132- Trial of 5-18-90]

(Exhibit 9-2)

left the department.

Q. Are these the type of shoes, Ms. Fehrenbach, that are sold in a K-Mart Store?

A. Yes.

Q. Are these also the type of shoes that are sold at the rack where you first observed Mr. Chow going?

A. Yes.

Q. Now, when you first saw Mr. Chow walking or att - - or leaving the shoe department area with Exhibit Two shoes on, what did you then do?

A. I went over and called security.

Q. Before calling security, did you make any effort to find out if in fact, those were new or the old shoes?

A. No.

Q. Okay. You went and called security?

A. Hmm-hmm (affirmative response)

Q. Okay. Who would you have called?

A. Fred Sweet.

Q. Okay. And what did you inform Mr. Sweet of?

A. That there was a customer that had a new pair of shoes on, and that his old shoes were in my department.

Q. You just indicated that your old - - that the old shoes were in your department; how do you know that?

A. Cause after Mr. Chow left the department I went back to the where - - wall, and I found 'em, the old shoes sitting on

[p. -52- Trial of 5-18-90]

(Exhibit 10)

Q. - - him walking up to the center aisle?

A. Yes.

Q. What did if anything, did you observe Mr. Chow doing as he was walking?

A. He was still scuffing his heels - -

Q. Okay - -

A. - - as he was walking.

Q. And then after he proceeds up the center aisle, what if anything did you observe - - - or where did you observe Mr. Chow go then?

A. He went through the check-out lines.

Q. Now, approximately, how long after he left the shoe department store until he eventually proceeded to the check-out line was Mr. Chow walking around the store?

A. Ten, fifteen minutes.

Q. Okay. And when Mr. Chow then proceeded to the check-out line, did you observe this?

A. Yes, I did.

Q. Okay. Did you leave your department, or were you still at your shoe department at that time?

A. I went up to the center aisle of the store to straighten my depart - - the shoes in the midway, and then walked up to the Service Desk.

Q. Is the Service Desk located near - -

A. It's the - -

[p. - 59 - Trial of 5-18-90]

(Exhibit 11)

shoe department?

A. He went to the Home Center Department, the Home Center Patio area.

Q. Okay. And can you indicate for us what type of merchandise is located in that particular department?

A. There's several plants, there's also hardware supplies, soil, basic - - your lumber area.

Q. Do you recall the condition of the floor at that particular time?

A. Well, this was at closing time, so the floor was pretty well - - it was dirty.

Q. Okay. Did you observe Mr. Chow go into that department?

A. Yes, I did.

Q. Okay. Did you observe him leave that department?

A. Yes.

Q. And after leaving the Home Center Department, where did he then proceed to?

A. Proceeded to come - - almost make a circle and come back around by the Sporting Goods Department, come back through - - right across the footwear, around by the apparel section. Kind of made a U-turn through the whole store.

Q. And when you were making these observations of Mr. Chow, while you were following him, did you observe Mr. Chow scuffing his heels?

A. Yes, I did.

[p. - 84 - Trial of 5-18-90]

(Exhibit 12)

MEMORANDUM

To: Attorney Kurt O'Keefe

From: Chi-Ming Chow /s/__________________

Subject: My file of C894032 in your office

Date: August 2, 1990

1. I have been told by Attorney Stelmach that I have the right to have a complete file of my case from your of office.

2. I called you twice since last week to pack up my old file from your office. Each time you hung up on me several times and getting no result. So I now request that your send my complete file including Attorney Stelmach's foot wear receipt and my student lists and campus student news paper by certified mail to:

Attorney Kane Yee
First Federal building
33333 West 12 Mile Road, Suite 201
Farmington Hills, Michigan 48018

3. Before the trial of May 18, 1990, I believed that you had the intention to work on my case because you did go with me to video tape record those shoes at the palace department and took floor pictures at Kmart. However, on the trial day, after you made a deal with the prosecutor and Kmart employees without me just before the trial, you changed your attitude. You agreed with them to omit Kmart's demonstration in front of the jury at Kmart and my demonstration in front of the jury. During the trial I whispered the alive demonstrations to you again, and you told me to shut up. The result was that you lost

my case. I think it is time for you to shut up and dome thing good for my case to show your regret. (If you honestly deny that you ever used the words, shut up, to me, then I shall also withdraw this sentence. I use these words only if you used them to me before.)

4. Some attorney said that you made a bad deal with the prosecutor and Kmart employees. I consider that it was an unintelligent deal if you did not make it intentionally. If the jury's verdict was racially motivated, Kmart self-made and unconfirmed false evidences at least gave the jury an excuse to make such unjust and unfair verdict.

5. You mentioned the possible broken fertilizer bag at trial. Were you trying to help the other side to make the jury believe that the dirt and mud on my shoes were fertilizer? This was again an unintelligent statement if you did not say it intentionally.

6. Had we had Kmart's demonstration in front of the jury, then the jury could not have denied the fact that no one could changed a pair of new shoes into a pair of one-week old shoes by a few minute wearing.

7. I have always said that we shall have no regret if we have tried our best. Did you try your best to help me? I have suffered a lot because of this case.

cc: Attorney Yee and Attorney Stelmach.

(Exhibit 13)

WOODS AND O'KEEFE
ATTORNEYS & COUNSELORS AT LAW
2950 DAVID STOTT BUILDING
DETROIT, MICHIGAN 46226

August 6, 1990

Chi Ming Chow
2580 Holmes Road
No. 16
Ypsilanti, MI 48198

Dear Mr. Chow,

In response to your scurrilous letter of August 2, 1990, you twice made appointments to come to my office to pick up the file and failed to show.

You can pick up the file at my office, or send $20.00 for the estimated cost of mailing it to Mr. Yee.

I made no deal with the prosecutor and Kmart employees at any time.

I did tell you to shut up because it is impossible to try a case with your client yelling things into your ear.

I did nothing but my best for you, at and before the trial.

Sincerely yours,

/s/______________
Kurt O'Keefe

cc: Yee

(Exhibit 14)

The court is going to first address the ineffective assistance of counsel. And this Court finds that counsel must be at least adequate, at least this is what the standard I think is, what other attorneys would do. He is not held to a standard of expertise in the area, but that he would be adequate in the area of criminal law.

The court notes that in terms of the adequacy there are several issues that have come up. One is contrary statements by the prime witnesses against the defendant, the complaining witnesses, and those statements which appeared to contradict the testimony at trial were not gone into.

Second of all, there was an introduction, as I read the transcript, without objection. So though the other - - though Exhibit 17 was offered in rebuttal, Exhibit 15 was offered in the main part of the prosecution's case, and it came in without objection.

And the Court notes that, yes, it may e trial strategy that this attorney allowed these to go in, but if, in fact, this is trial strategy, it is the opinion of this Court that it is ineffective assistance of counsel. The shoes that were allowed in on Exhibit 15 are several sizes larger than the plaintiff's Exhibit 2. We don't know - - I don't know what the guard looked like, because his height and weight is not indicated in the record.

In terms of the appellant, he is a very slight man. I know that not because it's indicated in the record, but because he is present today for the hearing. That the shoes show obvious wear on the bottom and obvious type of dirt that one ordinarily would find outside and it may be that it came from the garden center at the Kmart store and that may be plausible.

The problem is that there was this contrary statement that also wasn't gone into and the burden of proof here is beyond a reasonable doubt.

But given these two factors, one the shoes that were allowed into evidence, the rebuttal shoes that were worn a week that were allowed into evidence, this is just absurd to me that they would allow somebody to wear shoes for a week and then offer them into evidence and it be received without objection. I find that to be truly absurd.

And I, therefore, find it is ineffective assistance of counsel. I remand this to the District Court for another trial.

In terms of against the great weight of the evidence, let me rule on that. I don't find the verdict against the great weight of the evidence, if that be a

[p. - 22 -]

(Exhibit 15-2)

standard, which I'm not sure in criminal cases it is a standard, but I don't think it makes any difference because I find ineffective assistance of counsel.

MS. DELIN: Thank you, your Honor.

MR. TOTH: The case will be - -

THE COURT: You may have all of your shoes back right now. You can take them, the prosecution.

MR. TOTH: Well, can we secure them in the box and just hold onto them, because they're going to be - - and seal them:

THE COURT: All right.

(Hearing concluded)

[p. - 23 -]

(Exhibit 15-3)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

PEOPLE OF VAN BUREN TOWNSHIP, Plaintiff/Appellee, v. CHI-MING CHOW, Defendant/Appellant.	))))))))	Case No. 90-019210-AR HON. MARIANNE O. BATTANI

MATTHEW G. CURTIS (P37999)
Van Buren Township Attorney
Attorney for Plaintiff/Appellee
2000 Town Center
Suite 900
Southfield, MI 48075-1100
(313) 355-0300

SYLVIA K. DELIN (P39085)
Attorney for Defendant/Appellant
401 S. Woodward Avenue
Suite 450
Birmingham, Michigan 48009
(313) 647-4540

ORDER FOR NEW TRIAL

At a session of said Court, held in the City-County Building in the City of Detroit, Wayne County, Michigan, on February 22, 1991
PRESENT: MARIANNE O. BATTANI
CIRCUIT JUDGE

Upon appeal of Defendant, Briefs tendered by both parties, oral argument held before the Court, and the Court being apprised of the premises thereof;

IT IS HEREBY ORDERED AND ADJUDGED that the Judgment of the Lower Court be reversed due to ineffective assistance of defense counsel in failing to object to the introduction of inadmissible evidence, to-wit: Plaintiff's shoe exhibits numbers 15 and 17, and that this cause be and hereby is remanded to the 34th Judicial District Court for a new trial.

/s/____________________
Marianna Battani
Circuit Judge

(Exhibit 16-2)

[HANDWRITTEN NOTE]

Received evidence box in case of People of Van Buren v. Chow, Case # 90-019210AR from Judge Mariann Battani

/s/____________________

4-19-91

(Exhibit 17)

Documents Relevant to the Proceedings

Court of Appeals, State of Michigan

ORDER

Maureen Pulte Reilly
Presiding Judge

People of Van Buren Twp v Chi-Ming Chow

Docket # 138761

L.C.# 90 019210 AR

The Court orders that the motion to compel prosecutor to produce an exhibit is GRANTED.

A true copy entered and certified by Ella Williams, Chief Clerk, on

March 31, 1992
Date

/s/____________________
Ella Williams
Chief Clerk

(Exhibit 18)

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF VAN BUREN) CoA No.: 138761
TOWNSHIP,) Docket No.: 89-4032
Plaintiff/Appellant,) C.C. No.: 90-019-210-AR
)
v.)
)
CHI-MING CHOW,)
Defendant/Appellee.)

MATTHEW G. CURTIS (P37999)
Van Buren Township Attorney
Attorney for Plaintiff/Appellee
2000 Town Center
Suite 900
Southfield, MI 48075-1100
(313) 355-0300

WILLIAM E. ZIEM (P29097)
Attorney for Defendant/Appellee
990 Decker Road
Walled Lake, MI 48390
(313) 624-6330

AFFIDAVIT OF HOWARD L. PHILIPPART

I, HOWARD L. PHILIPPART, being duly sworn, depose and state as follows:

That I, Howard L. Philippart, am employed by the Wayne County Prosecutors Office. On September 25, 1992, I made contact with the Van Buren Township Police

Department regarding viewing physical evidence used in the case of People vs. Chi-Ming Chow, District Court Case No. 089-0432 in the '34th District Court for the County of Wayne. I was informed by Mr. Matthew Curtis, attorney for Appellant, that physical evidence in question is not available and that the exhibits were missing.

(Exhibit 19-1)

Further Deponent saith not.

/s/____________________
HOWARD L. PHILIPPART

Subscribed and sworn to before
me this 29 day of September, 1992.

/s/________________________
Notary Public
Okena County, Michigan, acting in Wayne
My Commission Expires: 1/25/95

(Exhibit 19-2)

CHARTER TOWNSHIP OF VAN BUREN
DEPARTMENT OF PUBLIC SAFETY

October 13, 1992

Matthew Curtis, Esq.
2000 Town Center
Suite 900
Southfield, MI 48075-1100

Dear Mr. Curtis:

As per our recent telephone conversation, an investigation was completed regarding the improper disposal of t. he evidence pertaining to the case of Chi-Ming Chow. After the trial in district court, the evidence was returned to the property room to be held pending any appeal. The evidence was then sent to circuit court for review during the appeal process. When the court made their decision, Jean Johnson, a civilian clerk who also controls the property room, received a call to recieve the shoes as they were no longer needed by the court.

Ms. Johnson was not aware that his matter was still pending and based on her conversation with the court believed the case to be closed. The evidence was disposed of during a department auction held on August 29, 1992.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,

/s/________________
Mark Perkins
Director

(Exhibit 19-3)

VAN BUREN TOWNSHIP CASE NO. 41-035-89

STATEMENT

NAME:
JEAN JOHNSON # 766

ADDRESS:
46425 Tyler Road, Belleville, MI 48111

DATE:
9/29/92

RE: CHOW, CHI-MING, 11-15-31- SHOES

APPROXIMATELY TWO YEARS AGO, I RECEIVED A TELEPHONE CALL FROM CIRCUIT COURT, ADVISING ME TO PICK UP A BOX OF SHOES REGARDING VBPD CASE# 41-035-89. THE GENTLEMAN THAT I SPOKE WITH STATED THAT THE CASE WAS OVER AND THE SHOES NEEDED TO BE PICKED UP. THE SHOES WERE PLACES IN THE VAN BUREN TOWNSHIP POLICE PROPERTY ROOM AND REMAINED THERE UNTIL THIS AUGUST, 1992, AT WHICH TIME THEY WERE AUCTIONED OFF AT THE POLICE AUCTION.

I NEVER RECEIVED AN APPEALS LETTER REGARDING SAME.

WITNESS: /s/________________________

Jean Johnson #766
SIGNATURE OF PERSON GIVING
VOLUNTARY STATEMENT

(Exhibit 19-4)

Documents Relevant to the Proceedings

Exhibit 19-5

exhibit 19-5

Focus ...
Superior, Ypsi Twps.

John Mulcahy

Superior Township Treasurer Martha Kern triumphed in more ways than one with her violin performance at St. Luke's Episcopal Church concert of American music during this year's Ypsilanti Heritage Festival.

Kern played "Ashokan Farewell," better known as the theme song to the Public Broadcasting System production of "The Civil War." Kern was joined by Ypsilanti resident Ken Parks, who read the 1861 letter of Maj. Sullivan Ballou of the 2nd Rhode Island Volunteers to his wife, Sarah, written a few days before his death in the first battle of Bull Run. Ballou's letter also is in the PBS program.

"It was really a pretty good effort," said Kern, who

Police seek help indentify

By SARA COPPERNOLL
Press Staff Writer

VAN BUREN TWP. — Investigators are hoping someone may recognize the articles of clothing found on the skeletal remains of an unidentified body Friday in a wooded area near the northbound I-275 exit ramp on Ecorse Road.

The clothes are one way police are hoping to identify the partial skeleton found by a person searching for mushrooms at about 7:30 p.m. Friday in the woods.

The small-size "Sportique" brand black T-shirt with a silk screen of a rainbow and clouds has "Life begins where the rainbow ends" written on the front. The writing is white with a blue border, police said.

Because of the severe decomposition, police are unable to offer a description of the person, other than a white female about 5 feet tall.

"We're hoping to have an approximate age by tomorrow," Cpl. Gregory Laurain said Monday.

The cause of death has not been determined at this time.

Anyone with information is asked to call the Van Buren Po-

Van Buren Township police Officer Jean Johnson di- [illegible] of a body found

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

September 9, 1993

Joseph H. Wagner
432 West Michigan Avenue
Ypsilanit, MI 48197

Dear Mr. Wagner:

This will acknowledge receipt of your letter of Sept. 3, 1993 concerning your client, Professor Chi-Ming Chow.

I have gone through the voluminous materials and have asked Assistant Prosecutor Raymond Walsh of this office to review them as well.

The materials disclose that your client was detained for suspected shoplifting and then arrested, prosecutied and originally convicted and fined. However, the Circuit Court reversed the conviction because of ineffective assistance of counsel and remanded for a new trial. The Township Prosecutor then sought leave to appeal to the Michigan Court of Appeals where a three-judge panel affirmed the Circuit Court reversal and remand. Meanwhile, the shoes that were subject of the alleged theft and needed as evidence were apparently lost. Now your client would like criminal charges instituted against Jill Fehrenbach of K-Mart and Prosecutor Curtis of Van Buren Township (see page 13 of "To Whom It May Concern" document).

I am sympathetic to your client if, as may be the case, he was wrongly accused of taking the pair of shoes. Too, if the motivation of the named individuals can be shown to be improper, it may be that he has a basis for a civil rights action against those individuals; on that, I expressed no opinion. But I do not see a basis for any criminal charge that we could even remotely hope to prove beyond a reasonable doubt.

Sincerely,

John D. O'Hair
Prosecuting Attorney

/s/__________________
George E. Ward
Chief Assistant Prosecutor

December 16, 1993

Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, MI 48198

Mr. George E. Ward
Chief Assistant Prosecutor
Office Of Prosecuting Attorney
1200 Frank Murphy Hall Of Justice
1441 St. Antonine Street
Detroit, Michigan 48226-2302

Dear Mr. Ward:

I have received a copy of your letter of December 1, 1993 to Attorney Wagner regarding my complaint against Kmart and Van Buren Township employees. Your letter asks for criminal statute and evidence to establish a beyond a reasonable doubt element of the cited statute. I shall give you all the necessary criminal statutes and evidences one by one to comply with your request. However, please allow me first to make the following statement in response to your letter:

1. My complaint filed on September 8, 1993 is a new and independent case in your office. I hope you will conduct your investigation independently and fairly. I hope that your investigation will be mainly based on evidence and fact. Evidence and fact are better than eloquent argument. In my complaint, I have attached a copy of my "To Whom It May Concern" letter which contains all the essential court documents and photos copies. I also have a video tape which you have not reviewed. This tape is a comprehensive recording which contains important documents and living and

sound recordings of all The physical evidences. Eyewitnesses from both sides for this recording were also recorded in the tape. This is why the tape actually verifies its own authenticity. (A copy of the description of the content of this video tape is attached to this letter.) All my photo copies and video tape are used as a substitution of my physical evidence which have been maliciously destroyed by the township prosecutor and police department. All photos and video tape have been legally verified and are now on files of Van Buren Township prosecutor's office, 34th District Court, Wayne County Circuit Appeals Court and Michigan Court Of Appeals. Seeing is believing. This is why we have asked your office to view all the evidences and facts so that you can investigate my case independently.

2. The main subject of the Michigan Court Of Appeals' decision and opinion of June 1, 1993 was to deny the township prosecutor's frivolous appeal. This decision is in favor of my position. It is not to clear the township prosecutor's wrong doings. The original transcript of this decision is printed on pink paper with an cover letter which states:' Under MCR 7.215 (A), Opinions not designated for publication at the time of release are printed on pink paper." One of my attorneys, Mr. Ziem, has commented that in order to avoid to create a precedent in publication, the court omitted the items of conspiracy and destruction of evidence. The court gave no explanation about the omission of conspiracy and destruction of evidence as it did for other items. However, the three Hon. Judges of Michigan Court Of Appeals denied the prosecutor's frivolous appeal for ineffective assistance of counsel. It's opinion states that the defense counsel allowed the prosecutor to use Kmart's contradictory testimony and evidence in court without his objection. In another word, it means that the defense counsel collaborated with the

prosecutor's conspiracy to use perjury in court. Also Wayne County Circuit Appeals Court granted a new trial for my appeal. Its opinion states that Kmart self-made evidence and contrary statements used in trial contradicts with their own prime witnesses reports. There are clear obvious worn off signs and dirt from outside of the store on Defendant's shoes. The burden of the contrary statement is beyond reasonable doubt. It was absurd that the defendant's counsel allowed Kmart to use its contradictory evidence in the trial without his objection. After making these comment, the Hon. Judge Battani ordered a new trial for ineffective assistance of counsel. Furthermore, the important physical evidence seized by legal process was ordered by Wayne County Circuit Appeals Court to be safely kept by the Van Buren Police Department (VBPD) for future new trial use. Now the physical evidence is destroyed by VBPD based only on the so-called unknown gentleman's phone call. This wilful neglect of duty and malicious destruction of evidence is to cover up their crime. This is a disgraceful scandal in our prosecution and law enforcement system. It is a contempt of the court order for destroying court evidence without a court order. (I am also attaching a copy of the Questionnaire Regarding Destruction Of Evidence for your reference.)

3. ACJ's opinion regarding the difficulty to file my criminal complaint is based on its experience of racial prejudice and injustice. Criminal complaints are filed everyday. Some are only based on circumstantial evidence or a witness's statement or allegation. In my complaint, I have all the fact, evidence and eye-witnesses for my complaint. Yet I have difficulty to file my complaint. However, no one is above the law. I have confidence in our National Constitution which assures equal justice and equal protection of our laws for all citizens born or naturalized in the United States. I shall

try every possible effort to file my complaint so that justice can be done. This will benefit all other people of our community so that they can get some extra protection of our law in their daily life.

I now state all the necessary criminal statutes and evidences of my complaint to comply with your request as follows:

1. MCLA 750.411a (Michigan Penal Code 750.411a), Fictitious crimes, report to police officers: (False accusation and false arrest by Kmart employees. Township police's arrest without a warrant for a false accusation which did not occur in his presence.)

Evidence, fact and witness: My photos and video tape recording of my old shoes show that there are rain splashed mud, wrinkles and scratches all around the shoe surfaces. There are deep worn off signs, pieces of dried grasses and dirt on the shoe soles and heels. Also Kmart's two original incident reports of August 12, 1989 (the same day of the incident occurred) written by Jill A. Fehrenbach and Fred Sweet stated that Mr. Chow put a pair of new shoes on his feet and then walked toward the front checkout. Failing to pay for the merchants on his feet. It is also a fact that Kmart's Fehrenbach was a student of my school, Oakland Community College, in 1986 and 1987. (For detail, please refer to my 'To Whom It May Concern' letter sent to you on September 8, 1993.)

Conclusion: It is impossible to change a pair of new shoes into the condition of my old shoes by walking 75 steps from the shoe shelf toward the front checkout as stated by Kmart's eye-witness. This fact proves the false accusation and false arrest committed by Kmart. The truth of this fact is beyond reasonable doubt. This is why my request to view my photo copies and video tape of the destroyed physical evidence is a must for your investigation. This false accusation and false arrest is the ORIGIN of all other crimes committed by Kmart and Van Buren Township employees. (For your convenience, I am again attaching copies of Kmart's two original incident reports and two pages of my photos copies of the physical evidences. A picture is worth a thousand words.)

(Note: On the other hand, if you are an honest and fair prosecutor, after reading Kmart's two prime incident reports of August 12, 1989 and viewing the condition of my old shoes , would you approve the case and believe that Kmart's accusation or allegation was beyond reasonable doubt?)

2. MCLA 750.425 (Michigan Penal Code 750.425): Inciting or procuring one to commit perjury. (Township prosecutor knowingly inciting Kmart employees to commit perjury in court to avoid being sued for damage.)

Evidence and fact: Before the trial, the Van Buren Township prosecutor Matthew Curtis and Kmart worked together to allow Kmart employee, Fred Sweet, to fabricate false evidence shoes and make contradictory testimony to be used in court. This perjury has been recorded in court document. (For detail, please refer to my "To Whom It May Concern" letter.)

3. MCLA 750.149 (Michigan Penal Code 750.149): Compounding or concealing offense. (Also see Prosecutional Misconduct 5.61 (e): Violations of Discovery Rules. The prejudice suffered by the defendant.)

Evidence and fact: The purpose of item 2 of this section stated above shows that the township prosecutor and Kmart used fabricated false evidence and false testimony to confuse the jury so that they could cover up and conceal Kmart's criminal act of false accusation.

4. MCLA 750.157a (Michigan Penal Code 750.157a): Conspiracy to commit offense or legal act in illegal manner. Evidence, fact and witness: In order to avoid being sued for adage, the township prosecutor Curtis and Kmart created the following conspiracy: Before the trial, the township prosecutor asked Judge Zaborowski to deny the defendant's request for a living demonstration in front of the jury at the scene of the incident. However, MCR 6.414, D allows such experiment at the scene of the incident. This demonstration and experiment can prove the defendant's innocence immediately. The prosecutor also stipulated with the defendant's trial counsel, Mr. Kurt O'Keefe, to allow Kmart to use false testimony and false evidence in court without his objection. The result of this conspiracy was that the perjury of their false testimony and false evidence either confused the jury or gave the prejudiced jury a good excuse to convict an innocent Chinese American. The defendant had to fight for 4 years in three courts to clear his name. (For detail, please refer to my "To Whom It May Concern" letter.)

Conclusion: Conspiracy is a combination of two or more persons to commit an unlawful act to injure another. It is an actionable tort and a criminal offense. My case fits for this definition. Furthermore, based on SJI 2d 117.01, the elements of Malicious Prosecution (Criminal Proceeding) include a prosecution caused or continued by one person against another and the termination of the proceeding in favor of the person who was prosecuted. My case again fits all these elements of Malicious Prosecution.

5. MCLA 750.422 (Michigan Penal Code 750.422), Perjury committed in courts:

Evidence, fact and witness: After the township prosecutor Curtis saw the condition of my old shoes and read Kmart's two reports of August 12, 1989, he knew it was a false accusation. At first, he told my attorney, Mr. Steven Stelmach, that if I admitted the accusation, there would be no trial and charge would gradually faded away. I said No. On November 21, 1989 at a pretrial conference, he told my attorney and me that the shoes looked bad and he might drop the charge. On May 1, 1990, he called my attorneys and tried to negotiate that he would drop the charge if I would waive all the civil liability against the township and Kmart. (For confirmation, please refer to my "To Whom It May Concern" letter.) I refused this unfair offer. In order to avoid being sued for damage, the prosecutor and Kmart created their conspiracy. (See item 4 of this section stated above.) This conspiracy carried out their perjury, false testimony and false evidence, in court. (For detail, please refer to my "To Whom It May Concern" letter.)

Conclusion: Making false statement and using false evidence under oath in court is a criminal offense of perjury.

6. MCLA 750.426 (Michigan Penal Code 750.426), Court reasonably believes perjury committed:

Evidence, fact and witness: In order to distort the physical evidence, Kmart's two employees, Fehrenbach and Sweet, testified under oath in the trial that they saw I walked around the store and scuffed the shoe heels for 10 to 15 minutes. Their testimonies were totally contradictory to their two original incident reports of August 12, 1989 which stated that I walked directly from the shoe shelf toward the front checkout. (Please refer to my "To Whom It May Concern" letter) Any store eye-witness sees such unusual act of scuffing the shoe heels around the store for 10 to 15 minutes will report such act as an important evidence of a crime in his/her incident report. Yet Kmart's two original eye-witnesses' reports of August 12, 1989 did not report one word about the scuffing shoe heels right after the incident with their fresh memories. This is because such action never happened. (For detail, please refer to my "To Whom It May Concern" letter.) If it is necessary, we can invite a forensic expert to make an experimental demonstration. We will let Kmart's Sweet wear a pair of new shoes and then demonstrate his so-call 10 to 15 minute scuffing shoe heels around the store. At the same time, we will ask a few store saleswomen and security guards not related to Kmart to follow and watch Sweet's demonstration. Right after the demonstration, we shall ask these eye-witnesses to write their eye-witness incident reports. If they are fair and honest, they will report the most important and unusual criminal act, namely, 10 to 15 minute scuffing shoe heels around the store. This fact will convince the jury that both Kmart's Fehrenbach and Sweet were lying in court under oath. They committed perjury in court. (Please also notice that no matter how Sweet scuffs his shoe heels, he can not get rain splashed mud on his new shoes from Kmart's floor.)

Conclusion: Making false statement in court under oath is a perjury.

7. MCLA 754.484 (Michigan Penal Code 754.484), Refusing to apprehend on being required to do so by justice.

Evidence, fact and witness: Township prosecutor Curtis refused and defied court orders to keep the physical evidence for new trial and hearing. On February 1, 1991, Wayne

County Circuit Court ordered the prosecutor to send all the physical evidence back to Van Buren Police Department to keep them for the new trial. On March 31, 1992, Michigan Court Of Appeals made order to compel the prosecutor to produce exhibit at the hearing. (For detail, please refer to my "To Whom It May concern" letter.) However, the prosecutor and the police department destroyed all the physical evidence without a court order.

Conclusion: Destruction of the court evidence without a court order is a contempt of court. Refusing to produce evidence requested by court is 'refusing to apprehend on being required to do so by justice.

8. MCLA 750.478, 750.388 and 750.149 (Michigan Penal Codes 750.478, 750.388 and 750.149) , Wilful neglect of duty, Malicious destruction of personal property seized by legal process and Compounding or concealing offense. (Also please see Prosecutorial Misconduct Sec. 5.7, Lost or Destroyed Evidence.):

Evidence, fact and witness: On April 19, 1991, township prosecution official Otis signed a receipt for Hon. Judge Battani to acknowledge his receipt of the evidence box. He then delivered it to Van Buren Police Department (VBPD) to keep for the future use in the new trial. Also on March 31, 1992, Michigan Court Of Appeals ordered to compel the prosecutor to produce evidence at the hearing. However, on September 25, 1992, when Wayne County prosecution official, Mr. Howard L. Philippart, called VBPD to examine the physical evidence of my case, he was told that the evidence box was missing. 4 days later, VBPD reported in writing that the evidence box was auctioned on August 29, 1992 without a court order. Their destruction of the evidence was based on the so-called unknown gentleman's phone call received by a civilian employee. (This civilian employee turned out to be a middle aged police officer with a police badge.) This whole thing is a disgraceful scandal to the prosecution and law enforcement system. (For detail, please see attached copy of Questionnaire regarding the Destruction of Evidence.)

Conclusion: Base on the evidence and fact stated above, it is clearly an undeniable case of wilful neglect of duty and malicious destruction of the physical evidence seized by legal process without a court order to cover up their crime and obstruct justice.

Finally, I hope that you, a government law enforcement official, will do your duty fairly so that justice can be done. I have been told by my attorneys that a prosecutor may be immune from a civil liability lawsuit if he is acting within the scope of his executive authority. However, a prosecutor can not be immune from a criminal act, This is why I need your office to investigate all the criminal acts in my case. I would again mention that the natural of my case is worse than the cases of Rodney King and Malice Green. In those two cases, the police officers might have over reacted when they were doing their duties. In my case, the township prosecutor knowingly assisted the criminals to cover up their crimes and harm an innocent citizen so that they could avoid being sued for damage. This is why Attorney Wagner wrote to you that my case was a most unusual case that he had ever encountered. I hope that your office will appreciate my anticipation of the malicious destruction of the evidence and my effort to preserve the physical evidence for you to investigate. Furthermore, had I worn a pair of new shoes and went to shopping on August 12, 1989 at Kmart, it would have been very difficult for me to prove my innocence. My life and my reputation might have been ruined forever. This devastating situation can happen to any one. This is why I also hope that my case will teach all stores a lesson. We may ask our law to request that a store must produce absolute evidence such as video tape recording to back up its accusation so that all the people of our community can get some extra protection of our law in their daily lives. My attorneys and I are eager to show my video tape in your office and at the same time, we shall also answer your questions regarding my complaint. Your arrangement for this appointment will be appreciated.

Very truly yours,

/s/________________
Chi-Ming Chow

c.c.: Mr. Roland Hwang, ACJ President
Attorney Joseph H. Wagner
Attorney Gregory L. Gliha

THE SENATE ASSISTANT MAJORITY FLOOR LEADER
SENATE JUDICIARY COMMITTEE

VIA HAND-DELIVER

May 8, 1996

The Honorable Frank J. Kelley
Attorney General
State of Michigan
Law Building, 7th Floor
Lansing, Michigan 48909

Dear Mr. Kelley:

Enclosed please find a complaint and related information from Mr. Chi-Ming Chow. As Chairman of the Senate Judiciary Committee, I respectfully request that your office review and investigate Mr. Chow's complaint. I would appreciate it if you would send me a copy of your response.

Thank you for your time and attention.

Sincerely,

/s/____________________
Wm. Van Regenmorter
State Senator

enclosures
cc: Mr. Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, MI 48198

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

February 1, 1996

Mr. Chi-Ming Chow
2580 Holmes Road, #16
Ypsilanti, MI 48198

Dear Mr. Chow:

Thank you for contacting my office with your concerns. I appreciate your bringing them to my attention.

I have referred this matter to Frank J. Kelley, Attorney General for the State of Michigan, and have asked him to look into your concerns. I hope this situation is soon resolved to your satisfaction.

Again, thank you for contacting my office.

Sincerely,

/s/____________________
John Engler
Governor

JE/pr

SENATOR ALMA WHEELER SMITH
STATE OF MICHIGAN

November 29, 1995

The Honorable Frank J. Kelly
Attorney General, State of Michigan
Law Building, 7th Floor
525 W. Ottawa
P.O. Box 30212
Lansing, MI 48913

Dear Mr. Kelly:

It has been brought to my attention that one of my constituents, Mr. Chi-Ming Chow, has brought his case to the attention of the Department of Attorney General's Criminal Division. This is a matter of the utmost importance to Mr. Chow and a cause that he has been pursuing for a very long time.

I had the opportunity to attend a meeting with Mr. Chow, his lawyer and Robert Ianni, Assistant in Charge of the Criminal Division. From the evidence presented, it seems to me that Mr. Chow has been egregiously wronged and it is understandable that he so steadfastly pursues this matter. regaining one's sense of dignity and self-esteem after such an unpleasant episode is important; vindication allows us to put instances of injustice behind us and resume our lives with faith in our system intact.

I will greatly appreciate your attention to his concerns and am confident that your office will give him whatever assistance it is in your power to provide.

Thank you for your consideration of this request.

Sincerely,

/s/________________
Alma Wheeler Smith
State Senator, 18th District

AWS/ms

UNITED STATES SENATE
WASHINGTON, DC 20610-2203

May 31, 1995

The Honorable Frank Kelly
Attorney General, State of Michigan
525 W. Ottawa
Law Building, 7th Floor
P.O. Box 30212
Lansing, MI 48913

Dear Mr. Kelly:

It has come to my attention that Mr. Chi-Ming Chow of Ypsilanti, has a case with the Department of Attorney General's Criminal Division. Although this issue falls outside my jurisdiction, I would appreciate your immediate and full attention to the concerns of Mr. Chow and the investigation that is being conducted.

Thank you for your attention to this matter.

Sincerely,

/s/______________________
Spencer Abraham
United States Senate

ESA/jjp

cc: Mr. Chi-Ming Chow

UNITED STATES SENATE
WASHINGTON, DC 20510-2202

May 17, 1995

The Honorable Frank J. Kelly
Attorney General
Michigan Department of Attorney General
525 West Ottawa
Law Building, 7th Floor
P.O. Box 30212
Lansing, MI 48913

Dear Mr. Kelly:

Enclosed is a copy of a letter I received my constituent, Mr. Chi-Ming Chow, regarding an upcoming meeting with Mr. Robert Ianni of your staff.

I have been working with Mr. Chow for several months concerning the difficulties he is experiencing with the Wayne County Prosecutor's Office. As I understand it, he will be meeting with Mr. Ianni to discuss this matter.

Therefore, I trust that Mr. Chow's concerns will be given careful consideration and that he will be provided the appropriate assistance allowed under the law.

Thank you for your time and attention to this matter.

Sincerely,

/s/__________________
Carl Levin

UNITED STATES
HOUSE OF REPRESENTATIVES

April 7, 1995

Frank J. Kelly
Michigan Attorney General
Law Building
525 W. Ottawa
P.O. Box 30212
Lansing, MI 48909-0212

Re: Chi-Ming Chow

Dear Mr. Kelly:

Mr. Chi-Ming Chow has requested that I contact you regarding his case. It is my understanding that your office has agreed to meet with Mr. Chow to discuss his complaint.

I fully understand that Mr. Chow's case concerns a matter over which Congress has no jurisdiction. I would, however, as Mr. Chow's U.S. Representative, urge that his case be given full and fair consideration as is the usual practice in your office.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

/s/____________________
Lynn N. Rivers

HOUSE OF REPRESENTATIVES
LANSING, MICHIGAN

March 21, 1994

John D. O'Hair
Wayne County Prosecuting Attorney
1441 St. Antoine
Detroit, Michigan 48226-2302

Dear Mr. O'Hair:

One of my constituents has written to me regarding an incident that took place in 1989. The attached correspondence from Mr. Chi-Ming Chow fully describes the circumstances surrounding this incident and the subsequent actions he has taken to verify his innocence.

This letter is sent to you to respectfully request a review of Mr. Chi-Ming Chow's case as soon as possible. Any assistance you can offer in getting the matter resolved would be appreciated

Sincerely,

KIRK A. PROFIT
State Representative
54th District

DOCTORS OF INTERNAL MEDICINE
30335 W. 13 MILE ROAD, SUITE 100
FARMINGTON HILLS, MICHIGAN 48334
TELEPHONE: (810) 626-6500

STEVEN D. GRANT, M.D., F.A.C.P.
LOWELL S. PAUL, M.D.

June 6, 1996

Chi Ming Chow
P O Box 903
Novi, MI 48376

To whom it may concern:

Chi Ming Chow has been my patient since February of 1986. In December of 1989, he complained of anxiety and insomnia secondary to allegations that he stole shoes at a local Kmart. These symptoms have persisted even though the case was dismissed in July of 1993. Mr. Chow feels that there was a conspiracy against him by the police and prosecutors, and is pursuing this through his attorney. Also, he has obtained letters from various selected representatives at both the state and national levels.

I feel that his anxiety and insomnia are definitely related to the events that have transpired since 1989. If you need more information, please contact my office.

Sincerely,

/s/__________________
Steven D. Grant, M.D.

CITY OF ANN ARBOR, MICHIGAN
HUMAN RESOURCES DEPARTMENT

CITY OF ANN ARBOR, MICHIGAN
220 E. Huron, Suite 340,
P.O. Box 8647,
Ann Arbor, Michigan 48107
Phone: (313) 994-2803 Fax: (313) 994-2590

April 21, 1997

Mr. Chi-Ming Chow
2580 Holmes Rd #16
Ypsilanti, MI 48198-4217

RE: Civil Rights Violations

Dear Mr. Chow:

It was my pleasure meeting with you and your attorney on April 18, 1997 to discuss the unfortunate experience you had with the law enforcement agencies in the State of Michigan.

After a review of your video tape and discussion of the evidence you presented, I strongly recommend that you file formal complaints with the following agencies:

U.S. Justice Department
Civil Rights Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
Telephone: (202) 514-4224

U.S. Civil Rights Commission
624 9th Street, N.W.
Washington, DC 20525
Telephone: (202) 376-8177

Your letter dated April 3, 1997, addressed to the Michigan Attorney General's office clearly outlined your concerns. I suggest that you submit that letter to both agencies.

If I can be of further assistance, please contact me.

Sincerely,

/s/__________________
Raymond E. Chauncey
Human Rights Coordinator

cc: Joseph H. Wagner

UNITED STATES COMMISSION
ON CIVIL RIGHTS

624 Ninth Street, NW.
Washington, D.C. 20425

July 6, 1997

Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, MI 48198-4217

Dear Mr. Chow:

The United States Commission on Civil Rights recently received your complaint.

The Commission was established to conduct studies, hold hearings, issue reports, and serve as a national clearinghouse for civil rights information. As such, the Commission has no authority to provide direct remedial assistance, or offer an opinion as to the soundness of individual allegations.

In order to be helpful, we have forwarded your complaint to:

U.S. Department of Justice
Civil Rights Division
10th and Constitution Avenue, NW
Washington, DC 20530

This agency is authorized to help resolve the problem you described. We have requested that the agency notify both you and the Commission in writing concerning all actions taken to resolve your complaint. Should you need to communicate further concerning this matter, please contact the referral agency at 202-514-2151.

We appreciate the concern and the circumstances that prompted you to write to the Commission.

Sincerely,

/s/____________________
FREDERICK D. ISLER
Assistant Staff Director
Office for Civil Rights Evaluation

Documents Relevant to the Proceedings

Cert. NO. P 200 524 058

May 27, 1997

Chi-Ming Chow (Mr.)
2580 Holmes Road, No. 16
Ypsilanti, MI 48198-4217
(313-484-0294,
FAX 313-484-0294. If it
is not on, please call.)

U.S. Attorney General Janet Reno
U.S. Department of Justice
Tenth Street and Washington SW
Washington DC 20530
(202-514-4224, FAX 202-514-1783)

(Original and attachment are sent by U.S. certified mail.)

Dear Hon. U.S. Attorney General Reno:

With Michigan Civil Rights Commission branch official, Mr. Raymond E. Chauncey's recommendation, I am filing this formal complaint against Michigan Attorney General Frank J. Kelley and his officials, George E. Ward, Robert Ianni and Stanley D. Steinbor. They can be reached at Michigan Attorney General's office, 525 W. Ottawa, Lansing , Michigan 48909-0212. (Please see attached copy of Mr. Chauncey's letter of April 21, 1997.)

My complaint includes the following two parties:

1. The first part of my complaint is regarding Michigan Attorney General Kelley and his officials' continuous

violation of my constitutional rights and civil rights to have equal Justice and equal protection of the laws. (In 1997 U.S. Government Manual, Page 339, Department of Justice, Civil. Rights Division, it states that the Division enforces the Federal statutes prohibiting discrimination on the basis of race, sex disability, religion and national origin. Under the Federal criminal civil rights statues, the Criminal Section prosecutes conduct involving conspiracies to interfere with federally protected rights.)

2. The second part of my complaint is regarding the corruption in Michigan Attorney General's office for its continuous coverup of criminal activities, obstruction of Justice and violation of my constitutional rights. (In 1997 U.S. Government Manual, Page 345, Department of Justice, Criminal Division, Public Integrity section, it states that Public Integrity Section oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of Government. Section attorney prosecute selected cases against Federal, State and local officials. It supervised the Ethics in Government Act.)

I now briefly state my complaint as follows. (As a victim of crime, I shall address all the persons who harmed me in my case as criminals.)

1. On August 12, 1989, I was falsely accused and arrest by Kmart. It alleged that a pair of my old shoes on my feet with deep wear and rain splashed mud as its new shoes. The accuser, a Kmart saleswoman, was a former student of my school. When the prosecutor saw the condition of my old shoes, he knew it was a false accusation and false arrest. If he was honest and fair and admitted their wrong doings, this case could be easily resolved. However, when I refused his unfair

offer to drop the charge without punishing the criminals who had ruined my life, he was too smart to think that he could abuse the law and harm an innocent Chinese American. This is the origin and central core of all the criminal activities committed by the law officials in my case. From here, the law officials committed theirs crimes one after another one. First, the prosecutor and Kmart created a conspiracy to use perjury, false evidence in court without my trial counsel's objection. Their conspiracy worked with the help of an unfair judge and my betrayed trial counsel. They convicted an innocent Chinese American in 1990.

2. I then appealed at the Circuit Court. The Honorable appeal court Judge reversed the unjust verdict and ordered a new trial in 1991. The prosecutor knew that he could not use the same perjury, false evidence and conspiracy again in a new trial. So he filed his frivolous appeal for a false accusation of misdemeanor case at Michigan Court of Appeals to buy time. It took two years to get a hearing. In 1993, a few months before the hearing, we found out that the prosecutor and police department had willfully neglected their duties , disobeyed court order and maliciously destroyed all the physical evidence seized by court without a court order to cover up their criminal activities. Fortunately, I anticipated such malicious destruction of physical evidence from the beginning. I have taken pictures of the physical evidence and also video taped all the physical evidence and essential court documents before the unlawful destruction. These photos and video tape have been verified by court. Consequently, the prosecutor lost his frivolous appeal in 1993 and the unjust charge was finally dismissed on July 29, 1993. (For detail, please see attached copy of my "To Whom It May Concern" letter of September 14, 1993.)

3. Two months after the unjust charge was dismissed, on September 8, 1993, I filed my criminal complaint at the county's prosecuting office. My complaint was filed on time. The county prosecutor neglected all the evidences and covered up my complaint. After a lot of correspondence with the prosecutor, the coverup was continuing. So on September 23, 1994, I filed my complaint at Michigan Attorney General Kelley's office. His officials so far have also neglected all the evidences and my complaint. They have continuously covered up, obstructed justice and violated my constitutional right for more than three years since I filed my complaint. They covered up my complaint because their own law officials are involved in my criminal complaint. I am essentially asking the criminals to investigate themselves.

4. During the past years, my Honorable Governor Engler, U.S. Senator Levin, U.S. Senator Abraham, U.S. Congressman Rivers, State Senator Smith, State Representative Profit and State Judicial Commission, all have reviewed my complaint and written letters to Attorney General Kelley and urged him to give a full and fair investigation of my complaint. Especially, on June 23, 1995, Honorable Senator Smith and I had a meeting at Attorney General's office to review my video taped evidence and discuss my complaint. After the meeting, her Honor wrote to Michigan Attorney General Kelley:" . . . From the evidence presented, it seems to me that Mr. Chow has been egregiously wronged and it is understandable that he so steadfastly pursues this matter...Regaining one's sense of dignity and self-esteem after such an unpleasant episode is important..." Her Honor's request and all others' requests got no response. (For detail, please see attached copies of their letters.)

5. On March 12, 1997, I wrote a letter to Michigan

Attorney General Kelley regarding U.S. Justice Foundation's request for an investigation of my complaint. On March 31, 1997, his office replied and still refused to investigate. (Please see attached copy.) It is clear that the coverup , obstruction of justice and violation of my constitutional rights are continuing.

6. I would also like to mention that our law states that immunity for public officials applies to their liability for their performance of their authority and duty. No public officials has the authority or duty to commit crimes. A criminal has no immunity. My scientific evidence has proved all the criminal activities committed by the law officials in my case. Therefore they have no immunity. Former President Nixon was forced to resign because of a coverup in Watergate case. Former FBI Manager Kahoe was convicted in Idaho Cabin case for malicious destruction of evidence, coverup and obstruction of Justice. Policemen in Rodney King case in Los Angeles and in Malice Green case in Detroit were sentenced to jail for their crimes. There was no immunity for these law officials. In front of the law, every on is equal. Immunity should not be abused to help the criminals.

Also the law states that prosecutorial discretion is an official's freedom of choice based on honesty, fairness and law, within the limit of his authority. Coverup, obstruction of justice and violation of a citizen's constitutional rights are not within the limit of an official's authority or discretion.

7. On April 22, 1996, Honorable U.S. Senator Abraham requested your department to investigate my complaint. On January 7, 1997, Honorable U.S. Congresswoman Rivers also wrote to you and asked your department to investigate my complaint. On May 7, 1997, your department informed me

that Honorable U.S. President Clinton's office had referred my complaint to your department. (Please see attached copies.)

All the above-mentioned facts clearly show that my effort to get the justice served for my complaint has never stopped one moment. This also shows that the corruption in Michigan Attorney General's office such as coverup, obstruction of justice and violation of my constitutional rights is continuing.

I am now attaching the following documents to support my complaint:

1. My recent correspondence with Michigan Civil Rights Commission official, Mr. Chauncey and his reply of April 21, 1997.

2. A copy of my "To Whom It May Concern" letter of September 14, 1993. This is a comprehensive summary of my case. It also contains all the essential documents and photo copies of the physical evidence.

3. A copy of my complaint filed at Michigan Attorney General's office and some correspondence between my attorneys, myself and Michigan Attorney General's law officials.

4. Copies of letters written by Honorable Governor Engler, U.S. Senator Levin, U.S. Senator Abraham, U.S. Congresswoman Rivers, State Senator Smith, State Representative Profit and State Senate Judicial Committee to Michigan Attorney General Kelley requesting him to investigate my complaint. (They got no response.)

5. Honorable U.S. Senator Abraham's and U.S. Congresswoman Rivers' letters to your Department requesting investigation of my complaint.

6. A copy of court verification of my video taped evidence including photos copies, (A 1993 TV 2 interview was added at the end of the recording of this tape.)

I shall bring my sound and colored video tape to your department for review and discussion of my complaint. This tape has clear and large pictures of the physical evidence and eye-witnesses of both sides. Your department should at lease interview the victim of the crime and review the video taped evidence before making its final decision. If your department overlooks the physical evidence, it will help the criminals fulfill their wishful thinking that they unlawfully destroyed all the physical evidences and then argued by their lies only.

At this point, I would like to ask your Honor to schedule an appointment for me to meet your officials to review my video taped physical evidence, court document and discuss my complaint. Interview of the victim of a crime and review the evidence are basic and necessary steps to investigate a criminal complaint. In order to have a fair and just discussion in this meeting, my U.S. Representatives or their representatives should also be invited as impartial observers and referees of this meeting.

Finally, I would like to mention that in a few more years , it will be the 21th century. Nowadays, in this free and democratic country, we emphasize equal justice and equal protection of the laws for 511. We emphasize eliminating racial prejudice, racial discrimination and racial hatred. In last March, Honorable U.S. President Clinton called on

Americans on Easter weekend in his Saturday radio message to reject racial hatred regarding a racial hatred incident in Chicago. In my case, I have been a victim of crime and injustice and suffered both physically and mentally since 1989. I hope your Honor will review and consider all the undeniable scientific evidence in my complaint without racial prejudice. All my scientific evidence clearly shows that Michigan Attorney General Kelley and his law officials have knowingly, intentionally and continuously covered up my complaint, obstructed justice and violated my constitutional rights. I hope your department will soon start the investigation of my complaint so that the justice can be served.

Your Honor's reply and justice will be appreciated.

Very truly yours,

/s/________________
Chi-Ming Chow

c.c.: Honorable U.S. President Clinton
Honorable U.S. Senator Abraham
Honorable U.S. Congresswoman Rivers
U.S. Justice Foundation
All other concerned

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

FRANK J. KELLEY
Attorney General
P.O. Box 30218
Lansing, 48909

October 5, 1994

Mr. Chi-Ming Chow
2580 Holmes Road, No. 16
Ypsilanti, MI 48198

Dear Mr. Chow:

Attorney General Kelley has asked me to review and respond to your recent correspondence requesting an investigation by this office into your complaint of obstruction of justice and perjury. I understand that you have previously requested an investigation from the Wayne County Persecutor's Office and have been advised that no such investigation was warranted. Based on my thorough review of the materials, there is insufficient evidence on which to conclude that Van Buren police or the local prosecutor were involved in any kind of conspiracy or were otherwise involved in any criminal activity. Moreover, ti appears that you have initiated a civil action against Kmart with regard to their conduct in this entire episode.

Accordingly, I must advise you that this office will not be reviewing the decision of Prosecutor O'Hair further but will, instead, defer to his judgment on whether any further investigation is warranted. I urge that you pursue your civil remedies thought private counsel. For you convenience I am returning the exhibits you attached to you letter.

I regret we cannot be of any further assistance to you.

Very truly yours,

/s/____________________
Robert Ianni
Assistant in Charge
Criminal Division
(517) 334-6010

RI:dev
Enc.

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT MICHIGAN

April 26, 1994

Gregory L. Gliha
9450 South Main St., Ste. 101
Plymouth, Michigan 48170

Dear Mr. Gliha:

This will acknowledge you letter of April 20, 1994.

I am disturbed that you would say "based on our previous telephone conversation, I know you feel Mr. Chow is a retired person with time on his hand to create all kinds of innuendoes. . . ." I was not until your letter of April 20th that I had ever been advised that Mr. Chow is a retired person, nor did I ever state or imply that he was "creating all kinds of innuendoes."

With respect to your request that some person at the Van Buren Township Police Department be charged under 750.388 for "malicious destruction of personal property seized by legal process", I note that the Court of Appeals itself evaluated the circumstances under which the subject shoes were destroyed and said: "On the record before us, we find no evidence that the auction of the evidence was not in good faith."

From the Court of Appeals opinion, it appears that the problem began on August 12, 1989 when a clerk at the K-Mart, who was a student at a College where Mr. Chow once taught, found "a pair of old shoes. . . among the new shoes on the rack she had re-stocked earlier that evening," and observed what led her to believe that Mr. Chow had come in for 3 pairs of a certain kind of shoe, but only paid for two, putting the third pair on and leaving the old pair she found.

Mr. Chow contends that the clerk could not have been in good faith in mistaking a pair of shoes that were a week old for brand new shoes. Thereupon, you would like to see charges against K-Mart employees under MCL 750.370 for "falsely and maliciously accusing another of crime," MCL 7503.411(a) for "wilfully and knowingly making a fictitious report to police officers, and MCL 750.422 for perjury, and against the city prosecutor or Mr. Chow's defense counsel under MCL 750.425 for "inciting or procuring one to commit perjury".

In contending that this whole incident had to have resulted from criminal intent, not negligence or carelessness, the problem your presentation creates for me is that it does not deal adequately with a number of factors, particularly the clerk's finding old shoes "among the new shoes on the rack she had re-stocked earlier that evening."

Again, I believe that Mr. Chow's best approach would be to consider this civil, not criminal.

However, because you have represented that the video tape in 10 minutes in duration, I will come by your office to view it for such additional information as it may provide. Please advise.

Very truly yours,

JOHN D. O'HAIR
Prosecuting Attorney

/s/_____________________
George E. Ward
Chief Assistant Prosecutor

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

No: 96-74187

CHI-MING CHOW,)
Plaintiff)
) [Filed-9/2/96]
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE)
Defendants.)
/

GREGORY L. GLIHA (P-42919)
Attorney for Plaintiff
409 Plymouth Road
Suite 195
Plymouth, MI 48170
(313) 451-7772

COMPLAINT

NOW COMES, CHI-MING CHOW, by and through his attorney, GREGORY L. GLIHA, and by way of complaint against defendant, STATE OF MICHIGAN, states as follows onto this Honorable court:

I. JURISDICTION

This action arises under the Fourteenth Amendment to the constitution of the United States, Section 1, as hereinafter, more fully appears.

II. GENERAL ALLEGATIONS

1. That Plaintiff, CHI-MING CHOW, at all times pertinent hereto, was a resident of the County of Washtenaw, State of Michigan.

2. That the Michigan ATTORNEY GENERAL'S OFFICE, at all times pertinent hereto, was a part of the judicial branch of government of Defendant, STATE OF MICHIGAN.

3. That Attorney General, Frank J. Kelly, was at all times pertinent hereto, the acting Attorney General of the defendant, STATE OF MICHIGAN.

4. That Assistant in Charge of the Criminal Division of the Michigan ATTORNEY GENERAL'S OFFICE, Robert Ianni, was at all times pertinent hereto, acting on behalf of the Defendant, STATE OF MICHIGAN, by and through his official capacity with the Michigan ATTORNEY GENERAL'S OFFICE.

5. That Chief Assistant Prosecutor for Wayne County, George E. Ward, was all times pertinent, acting on behalf of authority of Defendant. STATE OF MICHIGAN, by and through the Michigan ATTORNEY GENERAL's OFFICE.

6. That the Michigan Attorney General, pursuant to

M.C.L.A. 14.28 and M.C.L.A. 767.3, may prosecute at this discretion, or to designate the prosecution and investigation of civil or criminal actions on behalf of the people of the Defendant, STATE OF MICHIGAN.

7. That Van Buren Township Prosecutor, Matthew Curtis, was at all times pertinent, acting on behalf of authority of Defendant, STATE OF MICHIGAN by and through the Michigan ATTORNEY GENERAL'S OFFICE.

8. That Plaintiff, CHI-MING CHOW, was falsely accused of shoplifting on August 12, 1989.

9. That the local township prosecutors office conspired with Plaintiff's trial counsel to use false evidence and perjured testimony to convict Plaintiff, CHI-MING CHOW, of larceny (Exhibit A)

10. That said conviction of Plaintiff, CHI-MING CHOW, were reversed on appeal and final adjudication resulted on or about July 20, 1993 when criminal charges were dismissed. (See Exhibit A)

11. That exculpatory evidence (shoes) were maliciously destroyed by the prosecutor and police department between the time of prosecutor's appeal and the time of an order of a new trial by the Michigan Court of Appeals. (See Exhibit A photographs).

12. That witnesses for the prosecution had conspired to convict Plaintiff, CHI-MING CHOW, by criminal action of filing fictitious criminal reports, committing perjury, using fictitious evidence, destruction of evidence and concealing these offenses. (See Exhibit A.)

13. That on or about September 3, 1993, Plaintiff, CHI-MING CHOW, contacted the Wayne County Prosecutor's Office and George E. Ward for the purpose of investigating the criminal acts of the witnesses. (See Exhibit E)

14. That George E. Ward and the Wayne County Prosecutors Office, despite requests of Plaintiff, CHI-MING CHOW, and his attorneys, failed to adequately investigate or to file any criminal complaints against those witnesses, prosecutors and officials who had committed criminal acts. (See Exhibit B)

15. On or about September 23, 1994, Plaintiff, CHI-MING CHOW, contacted Michigan Attorney General Frank J. Kelley's office regarding his criminal complaint.

16. That on or about June 23, 1995, Plaintiff, CHI-MING CHOW, Plaintiff's counsel and State Senator Alma Wheeler Smith meet with Robert Ianni from the Michigan ATTORNEY GENERAL'S OFFICE in order to present evidence of criminal activity.

17. That despite viewing said evidence, Robert Ianni refused to further investigate Plaintiff, CHI-MING CHOW's, complaint on the basis the evidence was insufficient to suggest anything other than an "honest, al biet incompetent mistake." (See Exhibit B)

18. That Plaintiff, CHI-MING CHOW, continued to request the Michigan ATTORNEY GENERAL'S OFFICE to investigate his claim.

19. That Plaintiff, CHI-MING CHOW, requested his legislative officials, including his Governor, Honorable John

Engler, Senator, and U.S. Representative, to investigate his case completely.

20. That said Representatives made numerous written requests on behalf of Plaintiff, CHI-MING CHOW, for the ATTORNEY GENERAL'S OFFICE to investigate his complaint, all to no avail. (See Exhibit C.)

21. That Plaintiff, CHI-MING CHOW, has repeatedly presented to all prosecuting official's offices sufficient evidence of probable cause that a crime has been committed, and in particular, perjury, obstruction of justice, malicious destruction of evidence seized by a court, conspiracy, use of false evidence use and wilful neglect of duty.

III. FOURTEENTH AMENDMENT VIOLATION

22. Plaintiff, CHI-MING CHOW, hereby incorporates each and every paragraph, word for word, set forth above in paragraphs 1 through 21 above.

23. That Plaintiff, CHI-MING CHOW, a naturalized citizen of the State of Michigan, United States is entitled to the protection of due process and equal protection of the law as set forth int he Untied States Constitution, Fourteenth Amendment, Section 1.

24. That defendant, STATE OF MICHIGAN, legislature passed laws, and in particular M.C.L.A. section 14.28 and M.C.L.A. 767.3, giving the Attorney General and the local prosecuting attorney's office broad discretion to conduct an inquiry into criminal complaints based on evidence of probable cause a crime has been committed (there is no discretion to coverup crime).

25. That the Legislative purpose in enacting said legislation was, in part, to protect the citizens of the Defendant, STATE OF MICHIGAN, from criminal activities occurring without prosecution.

26. That at all times pertinent hereto, Plaintiff, CHI-MING CH0W was a member of the class of citizens the Defendant, STATE OF MICHIGAN, had enacted the law to protect.

27. That the guaranty of due process and equal protection under the Fourteenth Amend extends to any government proceeding or state action through the judicial, legislative, executive or administrative branch of government.

28. That the Fourteenth Amendment of the United States Constitution is a limitation of arbitrary power and a guarantee to Plaintiff, CHI-MING CHOW, that Defendant, STATE OF MICHIGAN, its legislation, and action of its state officials, and in particular, Frank J. Kelley, Robert Ianni, George E. Ward and Matthew Curtis shall not be unreasonable, arbitrary or capricious without reasonable standards.

29. That Defendant, STATE OF MICHIGAN, violated Plaintiff, CHI-MING CHOW's Fourteenth Amendment right to due process and equal protection of the law in that:

A. The State of Michigan legislature when enacting MCLA 14.28 and 767.3 gave broad discretionary power to investigate claims of it's citizens to the Prosecuting Attorney's Office.

B. That the law enacted, as a means selected, does not have a real and substantial relation to the object sought to be obtained in that the discretionary power of the prosecutor is arbitrary and capricious.

C. That Defendant, STATE OF MICHIGAN, through the ATTORNEY GENERAL'S OFFICE failed to adequately and thoroughly investigate Plaintiff, CHI-MING CHOW's, complaint due to the fact that some of the alleged criminal activity was by a local prosecutor's office and would be harmful to disclose to the public and was therefore covered up.

D. That the actions the ATTORNEY GENERAL'S OFFICE and the Wayne County Prosecutor's Office was arbitrary and capricious in that only a vague, superfluous investigation was conducted on behalf of the Plaintiff, CHI-MING CHOW, who presented probable cause evidence that a crime had been committed.

E. That the content of the legislative Act (MCLA 14.28 and 767.3) is unreasonable in that it gives too broad a discretionary power to investigate criminal complaints thereby allowing the investigating official the opportunity to pursue claims based on the strength of the evidence to secure a conviction, rather that the requirement of probable cause a crime has been committed.

F. That Defendant, STATE OF MICHIGAN, judicial officials failed to investigate adequately Plaintiff, CHI-MING CHOW's, criminal complaint for fear they would tarnish the image of their own office as they had judicial authority over the matter.

30. That Plaintiff, CHI-MING CHOW, suffered a Fourteenth Amendment due process and equal protection violation in that the arbitrary and capricious law and official conduct did not apply equally to him under the circumstances of the case.

31. That Plaintiff, CHI-MING CHOW, as a result of the above suffered an infringement of his entitlement to life, liberty and property and was deprived of his Fourteenth Amendment right and interest as a result of Defendant, STATE OF MICHIGAN's, conduct and laws.

DAMAGES

32. That as a direct and proximate cause of Defendant, STATE OF MICHIGAN's, legislative enactment and Attorney General's action, Plaintiff, CHI-MING CHOW, suffered the following deprivation of life, liberty and property;

A. The loss of liberty to be free from unpunished criminal activity of third parties.

B. The loss of enjoyment of life in that Plaintiff, CHI-MING CHOW, suffered grave emotional and physical harm in trying to bring his complaint to completion for the last seven years. (See Exhibit C.)

C. The property loss of thousands of dollars for expenses, including but not limited to, attorney fee's, copy costs, mail costs, clerical costs and medical expenses.

WHEREFORE, Plaintiff, CHI-MING CHOW, by and through his attorney, GREGORY L. GLIHA, demand judgment against Defendant, STATE OF MICHIGAN, for actual damages and consequential damages in excess of Fifty Thousands Dollars ($50,000.00), plus costs, interest and attorney fees and that this Honorable Court further find M.C.L.A. 14.28 and M.C.L.A. 767.3 unconstitutional in violating the Fourteenth Amendment, Section 1, of the Untied States Constitution.

DEMAND FOR TRIAL BY JURY IS HEREBY MADE.

Dated: September 2, 1996

/s/__________________
Gregory L. Gliha (P-42919)
Attorney for Plaintiff
409 Plymouth Road - Ste. 195
Plymouth, MI 48170
(313) 451-7772

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

No. 96-74187

CHI-MING CHOW,)
Plaintiff)
) [Filed-10/24/96]
v.)
)
STATE OF MICHIGAN,)
ATTORNEY GENERAL'S)
OFFICE, FRANK J. KELLEY,)
ROBERT IANNI, and GEORGE)
E. WARD, jointly and severally)
Defendants.)
/

GREGORY L. GLIHA (P-42919)
Attorney for Plaintiff
409 Plymouth Road
Suite 195
Plymouth, MI 48170
(313) 451-7772

MARGARET A. NELSON (P-30342)
Assistant Attorney General
Attorney for Defendant
Tort Defense Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-6096

AMENDED COMPLAINT

NOW COMES, CHI-MING CHOW, by and through his attorney, GREGORY L. GLIHA, and by way of amended complaint pursuant to F.R. Civ. P. 15 (a) against Defendants, FRANK J. KELLEY, ROBERT IANNI and GEORGE E. WARD, states unto his Honorable Court as follows:

I. JURISDICTION

This action arises under the Fourteenth Amendment to the constitution of the United States, Section 1, and under 42 U.S.C.S. Sec. 1983, as hereinafter, more fully appears.

II. GENERAL ALLEGATIONS

1. That Plaintiff, CHI-MING CHOW, at all times pertinent hereto, was a resident of the County of Washtenaw, State of Michigan.

2. That the Defendant, FRANK J. KELLEY, at all times pertinent hereto, was acting Michigan Attorney General.

3. That Defendant, ROBERT IANNI, at all times pertinent hereto, was the acting Assistant in Charge of the Criminal Division of the Michigan Attorney's General Office.

4. That Defendant, GEORGE E. WARD, at all times pertinent hereto, was the Assistant Prosecutor of the Wayne County Prosecutor's Office.

5. That pursuant to MCLA 14.28 and MCLA 767.3,

the defendants may prosecute a criminal complaint by a private citizen at their discretion, or to designate the prosecution and investigation of civil or criminal actions on behalf of the people of the State of Michigan and County of Wayne.

6. That the local prosecutors office conspired with Plaintiff's trial counsel to use false evidence and perjured testimony to convict Plaintiff, CHI-MING CHOW, of larceny (Exhibit A).

7. That Plaintiff, CHI-MING CHOW, was falsely accused of shoplifting on August 12, 1989.

8. That said conviction Plaintiff, CHI-MING CHOW, was reversed on appeal and final adjudication resulted on or about July 20, 1993, when criminal charges were dismissed. (See Exhibit A)

9. That exculpatory evidence (shoes) related to Plaintiff's original trial was maliciously destroyed against court order and was never returned to the plaintiff after repeated requests, and was never preserved for appeal between the time of the prosecutor's appeal and the time of an order of a new trial by the Michigan Court of Appeals. (See Exhibit A photographs).

10. That on or about September 3, 1993, Plaintiff, CHI-MING CHOW, contacted the Wayne County Prosecutor's Office, and filed formal complaint regarding criminal actions in his trial with Defendant, GEORGE E. WARD, for the purpose of investigation (See Exhibit B).

11. That Defendant, GEORGE E. WARD, did inadequately, negligently and carelessly investigate the matter

and repeatedly declined to issue a warrant, despite plaintiff's repeated requests by himself, and by his State Representative, Kirk A. Profit, as late as March 21, 1994. (See Exhibit B).

12. That on or about September 23, 1994, Plaintiff, CHI-MING CHOW, filed a formal complaint regarding the matter with Defendant, FRANK J. KELLEY.

13. That on or about June 23, 1995, Plaintiff, CHI-MING CHOW, Plaintiff's counsel and State Senator, Alma Wheeler Smith, met with Defendant, ROBERT IANNI, in order to further present evidence of probable cause crimes were committed against the Plaintiff.

14. That Defendant, FRANK J. KELLEY and ROBERT IANNI, did an inadequate, negligent and careless investigation of plaintiff's criminal complaint despite repeated requests to do so.

15. That Defendants failed to interview witnesses involved with the criminal complaint.

16. That Defendant, FRANK J. KELLEY, refused to properly investigate or prosecute plaintiff's complaint pursuant to authority provided him pursuant to MCLA 14.28 and MCLA 767.3.

17. That Plaintiff, CHI-MING CHOW, continued to repest all of the Defendants to investigate his claim.

18. That the Honorable Governor of Michigan, John Engler, along with State Representatives and Congressmen of the Plaintiff, made numerous written requests on behalf of Plaintiff to Defendant, FRANK J. KELLEY, to investigate the criminal complaint, all to no avail. (See Exhibit C).

19. That Plaintiff, CHI-MING CHOW, has repeatedly presented to all Defendant's offices sufficient evidence of probable cause that a crime has been committed, and in particular, perjury, obstruction of justice, malicious destruction of evidence seized by a court, conspiracy, use of false evidence use and wilful neglect of duty.

III. U.S. CONSTITUTION, XIV AMENDMENT AND 42 U.S.C.S. Sec. 1983 VIOLATIONS

20. Plaintiff, CHI-MING CHOW, hereby incorporates each and every paragraph, word for word, set forth above in paragraphs 1 through 19 above.

21. That Plaintiff, CHI-MING CHOW, a naturalized citizen of the State of Michigan, United States is entitled to the protection of due process and equal protection of the law as set forth in the Untied States Constitution, XIV Amendment, Sections 1 and 42 U.S.C.S. Sec. 1983.

22. That state of Michigan legislature passed laws, and in particular M.C.L.A. section 14.28 and M.C.L.A. 767.3, giving the Attorney General and the local prosecuting attorney's office broad discretion to conduct an inquiry into criminal complaints based on evidence of probable cause a crime has been committed.

23. That Plaintiff, CHI-MING CHOW was at all time pertinent hereto, was a member in a protected class of Michigan citizens who were victims of criminal activity, and particular criminal activity related to the Defendant's own officials.

24. That Plaintiff, CHI-MING CHOW, because he was a member of a protected class, was treated differently that non-crime victims of the State of Michigan in that the Defendant's failed to adequately investigate or prosecute criminal behavior on behalf of Plaintiff when they routinely do it for non-crime victims within their state.

25. That the State of Michigan provides inadequate post-deprivation remedies to Plaintiff in that there are no available procedures in place for Plaintiff to compel Defendant's to investigate criminal activity against themselves and are therefore constitutionally insufficient.

26. That, by and through the Defendant's failure to adequately investigate and prosecute the Plaintiff's criminal complaint, Plaintiff has suffered loss of liberty and property in that his is forced to use other means to remedy his complaint, such as contacting various state and local representatives to act on his behalf without success.

27. That at all times pertinent hereto, Plaintiff, CHI-MING CHOW, was a member of the class of citizens the Defendant, STATE OF MICHIGAN, had enacted the law to protect.

28. That 42 U.S.C.S. Sec. 1983 specifically provides a remedy for relief from the deprivation by the Plaintiff of any of his rights, privileges and immunities secured by the constitution and laws.

29. That as a direct and proximate result of MCLA Section 14.28, MCLA 767.3, and the Defendant's conduct, Plaintiff has suffered a deprivation of his fundamental rights, and in particular his right to privacy, freedom to associate and right to petition the government.

30. That the XIV Amendment of the United States Constitution, Section I, is a limitation of arbitrary power in that Defendant's actions shall not be unreasonable, arbitrary or capricious without reasonable standards.

31. That MCLA Sec. 14.28 and 767.3, nor any other laws governing the Defendant's actions herein, provide reasonable standards in which a prosecutor is to conduct a formal criminal investigation initiated by a private citizen with a formal complaint.

32. That Defendants violated Plaintiff, CHI-MING CHOW, XIV Amendment right to due process, equal protection and violated 42 U.S.C.S. Sec. 1983 in that:

A. The State of Michigan legislature when enacting MCLA 14.28 and 767.3 gave broad and discretionary power to investigate claims such as the Plaintiff's to the Defendant's, without reasonable standards, in particular to define discretion in the Defendant's investigation.

B. That the law enacted, as a means selected, does not have a real and substantial relation to the object sought to be obtained in that the discretionary power of the Defendant is arbitrary and capricious.

C. That Defendants failed to adequately and thoroughly investigate Plaintiff's complaint due to the fact that some of the alleged criminal activity was conducted by a subordinate prosecutor connected with the Defendant's office, resulting in a benefit to

Defendant's.

D. That the actions of the Defendants was arbitrary and capricious in that only a vague, superfluous investigation was conducted on behalf of the Plaintiff, CHI-MING CHOW, who presented probable cause evidence that a crime had been committed.

E. That the content of the legislative Act (MCLA 14.28 and 767.3) is unreasonable in that it gives too broad a discretionary power to investigate criminal complaints thereby allowing the investigating official the opportunity to pursue claims based on the strength of the evidence to secure a conviction, rather that the requirement of probable cause a crime has been committed.

F. Plaintiff's right to privacy has been violated in that in order to attempt to bring criminal activity to justice, many of his family, friends and legislator's have been informed of the intimate details of his wrongful conviction thereby injuring his reputation and character.

G. Plaintiff's right to petition his government for redress of grievances is violated in the not alternative laws exist to enable the Plaintiff to pursue the action of criminals against him except for MCLA 14.28 and 767.3, and further no right to petition for a remedy exists through the government for the negligent, careless, arbitrary and capricious actions of the Defendant's.

H. That Defendant, STATE OF MICHIGAN, judicial officials failed to investigate adequately Plaintiff, CHI-MING CHOW's, criminal complaint for fear they would tarnish the image of their own office as they had judicial authority over the matter.

33. That Plaintiff, CHI-MING CHOW, suffered a violation of due process and equal protection of the law under the XIV Amendment, and 42 U.S.C.S. Sec. 1983, in that he was a member of a class of individuals, victims of criminal activities against them by representatives of the Defendant's, who are not afforded the same equal application of the law under similar circumstances.

34. That Plaintiff, CHI-MING CHOW, as a result of the above suffered an infringement of his entitlement to life, liberty and property and was deprived of his Fourteenth Amendment and 42 U.S.C.S. Sec. 1983 rights and interest as a result of Defendant's conduct.

DAMAGES

34. That Plaintiff, CHI-MING CHOW, as a result of the above suffered an infringement of his entitlement to life, liberty and property and was deprived of his fourteenth Amendment and 42 U.S.C.S. Sec. 1983 rights and interests as a result of the Defendant's conduct:

A. He suffered embarrassment, humiliation, and loss of enjoyment of life.

B. His fundamental right to privacy, right to petition the government for redress of his grievances and freedom to associate has been violated.

C. The property loss of thousands of dollars for expenses, including but not limited to, attorney fee's, copy costs, mail costs, clerical costs and medical expenses.

WHEREFORE, Plaintiff, CHI-MING CHOW, demands judgment against the Defendants, STATE OF MICHIGAN, ATTORNEY GENERAL'S OFFICE, FRANK J. KELLEY, ROBERT IANNI, and GEORGE E. WARD, jointly and severally, for actual damages and consequential damages in excess of Fifty Thousands Dollars ($50,000.00), plus costs, interest and attorney fees and that this Honorable Court declare M.C.L.A. 14.28 and M.C.L.A. 767.3 unconstitutional in that it violates the Fourteenth Amendment and 24 U.S.C.S. Sec. 1983.

DEMAND FOR TRIAL BY JURY IS HEREBY MADE.

Dated: October 24, 1996

/s/___________________
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